

AN ANALYSIS OF APPLICABLE LEGAL ISSUES
CONCERNING EMPLOYEE SUBSTANCE ABUSE POLICIES
FOR THE FLORIDA COMMUNITY COLLEGE SYSTEM

By

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Dedicated

to

Mr. and Mrs. Charles W. Elliott

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The purpose of this study was to develop a model employee substance abuse policy, including a drug screening option, for Florida community colleges. The model resulted from a review of current policies as well as traditional legal research involving applicable federal acts and state statutes, case law, and literature. Potential judicial response relative to urinalysis was a particular focus.

Three federal acts directly implicate Florida colleges: the Drug-Free Workplace Act of 1988; Drug-Free Schools and Communities Act Amendments of 1989; and Omnibus Transportation Employee Testing Act of 1991. Current policies generally comply with the former two acts.

Urinalysis, ruled a search action by the U.S. Supreme Court, is the most controversial component of a substance abuse policy. The Court twice has upheld uniform drug screening where a nexus existed between employees' duties and public safety or national security. Disagreement remains as to how broadly the Court's rulings should be interpreted.

A preponderance of lower court decisions suggests a shift has occurred in legal theory away from individual privacy rights toward employers' rights to increasingly intrude upon employees' privacy.

Florida colleges are authorized, although not mandated, by statute to conduct drug screening programs. A near void of case law involving higher education on this issue makes judicial response only somewhat predictable. College officials desiring to include drug screening as a component of a substance abuse policy can be fairly certain testing safety-sensitive personnel will be upheld. Reasonable suspicion testing remains less settled, although the aforementioned shift in legal thought tends to support the employer's position. Whether other types of testing, e.g., uniform testing of job applicants, could withstand legal challenge remains unclear.

A model policy was developed as a resource for Florida colleges desiring to implement a policy that explicitly addresses requirements of applicable federal and state laws. Procedures outlined in the drug testing option were based on rules promulgated by the National Institute on Drug Abuse.

Further research was recommended concerning emerging case law and federal legislation on drug screening; actual practices regarding Florida community college substance abuse policies; and development of a model student substance abuse policy.

CHAPTER I INTRODUCTION

Substance abuse problems in the United States are the worst of any industrialized nation,¹ and Florida has been characterized as a "microcosm" of those problems.² Of those who use illicit drugs in the United States, approximately 70 percent are employed.³ One of Florida's major public employers is its 28-institution community college system, which as of the fall of 1991, had 30,502 persons on its payrolls.⁴ College and university officials should expect that some of their employees use illicit drugs.⁵ According to a 1991 Institute for a Drug-Free Workplace study, approximately 13 percent of Florida employees are offered drugs in the workplace.⁶ Eight percent of those employees

¹ STEPHEN B. THOMAS, HEALTH RELATED LEGAL ISSUES IN EDUCATION, 41 (National Organization on Legal Problems of Education) (1987).

² *Substance Abuse Bill Sent to the White House*, 50 CONG. Q. WKLY. REP. (July 4, 1992).

³ *U.S. an Addicted Nation*, 1 DRUG TESTING NEWS, 8 (September 1993).

⁴ REPORT FOR FLORIDA COMMUNITY COLLEGES: THE FACT BOOK 1991-92, 55 (Florida Department of Education, Division of Community Colleges).

⁵ James R. Stadler, *Drug Testing of College and University Employees*, 15 J.C. & U.L. 321 (1989).

⁶ *Institute Special Reports*, DRUG-FREE WORKPLACE REP. 9 (Summer 1993).

are approached to purchase drugs at work.⁷ Applying those figures to the Florida public community college employee population would suggest that more than 3,965 employees (13 percent) are offered drugs in the workplace, and over 2,440 (8 percent) are approached to purchase drugs.

Business and industry in the private sector have developed aggressive programs to combat illicit drug use among employees, while it has been suggested that academe has done little because "academics are either afraid to intervene or unaware of what options exist."⁸ One official contended, "Academics have had their behavior excused and have been protected by their peers more than any other professionals."⁹ A review of the policies of Florida's public community colleges revealed that governing board members and administrators are concerned about substance abuse.¹⁰ College administrators doubtless will become as aggressive about substance abuse as their counterparts in business and industry.¹¹

⁷ *Id.*

⁸ B.G. Ellis, *Faculty Members Must Intervene to Help Addicted Colleagues*, CHRON OF HIGHER EDUC., Jan. 30, 1991, at B2.

⁹ *Id.*

¹⁰ The researcher collected copies of substance abuse policies and/or other related documentation from the twenty-eight Florida community colleges. Employee drug testing is a component of some policies.

¹¹ Ellis, *supra* note 8, at B2.

Government's Response

Public education institutions in America have been significantly impacted by illegal drug usage.¹² A major response from government to this societal dilemma includes such legislation as The Drug-Free Schools and Communities Act Amendments of 1989.¹³ The U.S. Department of Education has established rules under the Act, which include the following requirements:

- (1) the annual distribution in writing to each employee, and to each student enrolled in one or more classes for any type of academic credit (except for continuing education units), regardless of the length of the student's program of study, of:
 - (a) standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;
 - (b) a description of the applicable legal sanctions under local, state, or federal law for the unlawful possession or distribution of illicit drugs and alcohol;

¹² *Id.*

¹³ 20 U.S.C. § 3224(a) (1989).

- (c) a description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
 - (d) a description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and
 - (e) a clear statement that the institution will impose disciplinary sanctions on students and employees (consistent with state and federal law) and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the aforementioned standards of conduct.
- (2) A biennial review of the institution's program to determine its effectiveness and for the purpose of implementing changes to the program as needed; and to ensure that the above mentioned disciplinary sanctions are consistently enforced.¹⁴

Certification of the aforementioned requirements is a prerequisite to receiving federal funds or financial assistance under the Act.¹⁵

¹⁴ Department of Education, 34 CFR Part 86 § 100.

¹⁵ 20 U.S.C. § 3224(a) (1989).

Another major government response has been the Drug-Free Workplace Act of 1988,¹⁶ which mandates that grantees and/or agencies having one or more contracts with the federal government of \$25,000 or more

- (1) certify that the agency provides a drug-free workplace;
- (2) publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace and what actions will be taken against employees for violations;
- (3) establish an ongoing, drug-free awareness program to inform employees of the dangers of drug abuse, the agency's drug-free workplace policy, the availability of any drug counseling programs, and the possible penalties for drug abuse violations occurring in the workplace;
- (4) require each employee directly involved in the work of the federal contract or grant to notify the employer of any criminal drug statute conviction for a violation occurring in the workplace;
- (5) notify the federal government of any violations;

¹⁶ 41 U.S.C. §§ 701-707 (Supp. 1991).

- (6) require the imposition of sanctions or remedial measures for an employee convicted of a drug abuse violation in the workplace; and
- (7) continue in good faith to comply with the aforementioned requirements.¹⁷

The penalty for noncompliance with the aforementioned provisions is the possible loss of government contracts/grants for up to five years.¹⁸ The Act does not require employers to establish employee assistance or drug testing programs,¹⁹ although the widespread implementation of public employee drug testing programs has occurred.²⁰

Drug testing, according to federal court rulings,²¹ is a search and seizure action. Testing is restricted by the protections of the Fourth Amendment of the U.S. Constitution.²² Originally, the Fourth Amendment was

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ David A. Cathcart, *Drug and Alcohol Policies and Testing Programs - A Review of Significant Issues*, C588 A.B.A.J. 319 (1991).

²¹ *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989); and *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402 (1989).

²² The Fourth Amendment to the U.S. Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing a place to be searched, and the persons or the things to be seized."

thought to protect citizens only from the federal government.²³ However, a 1961 U.S. Supreme Court decision²⁴ determined that protections afforded by the Fourth Amendment extend to state action through the Fourteenth Amendment.²⁵

As the law relevant to drug testing continues to evolve, Florida higher education policymakers will face difficult decisions in formulating institutional rules and regulations and operational policies to promote a drug-free workplace.²⁶ Most Florida public community colleges have established or are in the process of formulating employee substance abuse policies, some of which feature drug testing.²⁷ While it has been argued that drug testing programs may result in improved safety and productivity, responsible employers are aware that such programs bring

²³ LAWRENCE F. ROSSOW, *SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS*, 2 (Nat'l Organization on Legal Problems of Education) (1987).

²⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961)

²⁵ The Fourteenth Amendment to the U.S. Constitution provides that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

²⁶ J. Devereux Weeks, *Public Employee Drug Testing Under the Fourth Amendment After Skinner and Von Raab*, 24 *URB. LAW.* 515 (Summer 1992).

²⁷ The researcher collected copies of substance abuse policies and/or related literature from the twenty-eight Florida public community colleges. Employee drug testing is a component of some policies.

risks of litigation under constitutional, statutory, and common law doctrines.²⁸

Some predictability of judicial response has resulted from two 1989 U.S. Supreme Court opinions in *Skinner v. Railway Labor Executives' Association*²⁹ and *National Treasury Employees Union v. Von Raab*.³⁰ In both cases, the Supreme Court effectively relaxed the Fourth Amendment safeguards to permit suspicionless testing of employees in "safety sensitive"³¹ positions, i.e., those demanding proof of integrity to a drug prevention job mission or those with access to "truly sensitive"³² information. Prior to the *Skinner* and *Von Raab* decisions, the Fourth Amendment's explicit prohibition of unreasonable searches and seizures and requirements of probable cause for the issuance of a warrant had been more narrowly viewed. While federal courts have consistently ruled that neither a warrant nor probable cause are prerequisites to test public employees for illicit drugs, they have determined that testing must be "reasonable."³³

²⁸ Cathcart, *supra* note 20, at 322.

²⁹ *Skinner*, 109 S.Ct. 1402.

³⁰ *Von Rabb*, 109 S.Ct. 1384.

³¹ *Skinner*, 109 S.Ct. 1402.

³² *Id.*

³³ *Id.*

Some legal framework as related to the public school setting has been provided by the 1985 case *New Jersey v. T.L.O.*³⁴ In *T.L.O.*, the Supreme Court provided a two-prong test, the first prong focusing on whether, at the inception of the search, there are "reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating the law or the rules of the school."³⁵ The second prong deals with whether the ultimate scope of the search was "reasonably related to the objectives of the search and not excessively intrusive in the light of the age and sex of the student and the nature of the infraction."³⁶ *T.L.O.* provides some predictability of judicial response in the case of a student.³⁷ Whether the same standards might apply to a college or university employee is unclear.

The Purpose of the Study

The purpose of this study was to develop public employee substance abuse policy models designed to provide Florida community college governing board members and administrators with assistance in formulating policies that reflect institutional philosophies and missions. An

³⁴ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Perry A. Zirkel, *Stripping Students of Their Rights*, 74 PHI THETA KAPPAN 500 (February 1993).

analysis of federal and state case law, statutes, and rules and regulations relative to current Florida community college practices assisted in assuring that the policy models reflected legally acceptable frameworks. The intent of the analysis was to increase awareness of potential litigation and policymakers' ability to predict judicial response. The following policy issues were addressed:

1. Are current policies, as defined by Florida community college rules and regulations regarding substance abuse, in compliance with applicable state and federal guidelines?
2. What policies, in accordance with state and federal guidelines, may Florida community college governing boards and administrators consider to ensure a drug free workplace?

Background of the Study

Substance abuse has commanded considerable attention from the media, general public, lawmakers, employers, and employees in the last decade.³⁸ The population of the United States composes about 6 percent of the global population, yet uses 60 percent of all illicit drugs.³⁹ Americans spend some \$40.4 billion annually on illegal drugs.⁴⁰

³⁸ Weeks, *supra* note 26, at 515

³⁹ *U.S. an Addicted Nation*, *supra* note 3, at 8.

⁴⁰ JOHN F. LEWIS, ET AL., *DRUG AND ALCOHOL ABUSE IN THE SCHOOLS: A PRACTICAL GUIDE FOR ADMINISTRATORS AND EDUCATORS FOR COMBATTING DRUG AND ALCOHOL ABUSE* 3 (Nat'l Organization on Legal Problems of Education) (1992).

As previously cited, between 70⁴¹ and 75⁴² percent of all illicit drug users in the United States are employed, either full- or part-time. One estimate of the prevalence of illicit drug usage among all American employees is between 10 and 23 percent.⁴³ A like estimate surfaced in a Gallup Organization, Inc., study for the Institute for a Drug-Free Workplace (a coalition of major corporations developed to preserve employer and employee rights in drug testing). That study revealed that 22 percent of the respondents indicated illegal drug use in their workplace was "widespread," and 32 percent said the sale of illegal drugs occurred where they work.⁴⁴ Currently, there are 6.5 million regular marijuana users and 1.25 million regular cocaine users in the American workforce.⁴⁵ In 1991, almost one of every ten employees or job applicants tested for drug use tested positive.⁴⁶

Drug abuse in the workplace has been linked to increased absenteeism, theft, on-the-job injury, medical costs, poor job performance, damage to equipment, and liability.⁴⁷ Drug-abusing employees are three times as

⁴¹ *U.S. an Addicted Nation*, *supra* note 3, at 8.

⁴² *LEWIS*, *supra* note 40, at 2.

⁴³ *DALE A. MASI, DRUG FREE WORKPLACE: A GUIDE FOR SUPERVISORS* 4 (Bureau of National Affairs) (1987).

⁴⁴ *Id.*

⁴⁵ *INSTITUTE FOR A DRUG-FREE WORKPLACE, WHAT EVERY EMPLOYEE SHOULD KNOW ABOUT DRUG ABUSE* 1 (1993).

⁴⁶ *Id.*

⁴⁷ *Stadler*, *supra* note 5, at 321.

likely to be absent from work; are one-third less productive than other employees; use three times the average level of sick benefits; are five times as likely to file a workers' compensation claim; and have family members who use medical and psychiatric services four times more than those of other workers.⁴⁸ American employers estimate substance abuse costs between \$26 billion⁴⁹ and \$100 billion⁵⁰ each year in lost productivity and increased expenditures. The total economic impact of drug abuse in America has been estimated at \$176 billion annually.⁵¹

An example of the impact of substance abuse in the workplace was noted by Motorola Inc., officials in a 1989 study. Motorola made a net profit of \$500 million that year; yet company officials claimed that in lost time, impaired productivity, health care, and workers' compensation, drug use cost the Illinois-based firm 40 percent (or \$140 million) of its net profit.⁵² That amount was more than Motorola paid in taxes for the entire year and the equivalent of the salaries of 8,000 of its domestic workers.

48 *Id.*

49 *Id.*

50 Derek T. Dingle, *Managing the War on Drugs*, 7 BLACK ENTERPRISE 43 (July 1990).

51 LEWIS, *supra* note 40, at 1.

52 Dawn Gunsch, *Training Prepares Workers for Drug Testing*, PERSONNEL J. 52 (May 1993).

Like private industry, public education has been impacted by substance abuse in regard to students and employees.⁵³ One third of all high school seniors have used some form of illicit drug, and 37 percent of all Americans over the age of twelve report having experimented with illicit drugs. A National Institute of Drug Abuse study revealed that two thirds of Americans between twenty and forty years of age will use an illicit drug within a twelve-month period.⁵⁴

As noted in the introductory section of this chapter, one of the federal government's responses to this mammoth problem has been the passage of the Drug-Free Workplace Act of 1988.⁵⁵ The Act stipulates that for federal contracts of \$25,000 or more, employers must adopt, among other measures, a formal drug abuse policy. Moreover, employees must be notified of the aforementioned policy, and employers must establish a drug-free awareness program.⁵⁶ The Act is not a cure-all for drug abuse.⁵⁷

In addition to awareness and education programs, some employers have implemented drug testing to identify employees who abuse drugs.⁵⁸ In 1986, only 21 percent of

⁵³ *Id.*

⁵⁴ Dingle, *supra* note 50, at 43.

⁵⁵ 41 U.S.C. §§ 701-707 (Supp. 1991).

⁵⁶ Dingle, *supra* note 50, at 44.

⁵⁷ *Id.*

⁵⁸ LEWIS, *supra* note 40, at 3.

American companies tested job applicants for illicit drug use.⁵⁹ By 1989, more than 50 percent of all American companies were engaging in drug testing.⁶⁰ More than 25 percent of all Fortune 500 companies test employees for illicit drug use, and many smaller firms have or will follow suit.⁶¹ In 1989, more than eight million working Americans were subjected to urinalysis, and in 1990, that figure rose to approximately fifteen million.⁶² A Gallup survey revealed that two-thirds of all American employees would favor their employer maintaining or implementing a drug testing policy.⁶³

One of the most publicized studies on employee drug testing involved the U.S. Postal Service, which tested 4,396 new hirees in 1987-88.⁶⁴ Of those tested, 9 percent tested positive.⁶⁵ By 1990, that figure had escalated to 15.4 percent, and 10.5 percent were ultimately fired.⁶⁶

⁵⁹ John Horgan, *Test Negative*, 262 SCI. AM. 18, (March 1990).

⁶⁰ *Id.*

⁶¹ Mark Rust, *Drug Testing: The Legal Dilemma*, 72 A.B.A.J. 51 (Nov. 1, 1986).

⁶² Horgan, *supra* note 59, at 18

⁶³ LEWIS, *supra* note 40, at 3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Horgan, *supra* note 59, at 18-19.

Drug testing of school personnel is becoming more common.⁶⁷ However, neither the Drug-Free Schools and Communities Act Amendments of 1989⁶⁸ nor the Drug-Free Workplace Act of 1988⁶⁹ requires employers to engage in drug testing.⁷⁰ The latter act does not specify the type of discipline nor sanction to be imposed on offending employees, leaving such matters to the discretion of states and employers.

Some college and university officials are becoming proponents of drug testing, contending

- (1) academic institutions can more effectively serve students by maintaining a drug-free workplace;
- (2) a drug-free workplace assists in providing better educational opportunities;
- (3) institutions must protect their reputations in order to attract quality students and foster good relationships between the college and parents of students; and
- (4) faculty are more effective at teaching and, therefore, student learning is enhanced in the absence of drug use.⁷¹

⁶⁷ *Id.*

⁶⁸ 20 U.S.C. § 3224(a) (1989).

⁶⁹ 41 U.S.C. §§ 701-707 (Supp. 1991).

⁷⁰ LEWIS, *supra* note 40, at 5.

⁷¹ Stadler, *supra* note 5, at 322.

Conversely, opponents of drug testing argue that such programs foster discontent among employees and negatively impacts job performance.⁷² Some employees consider collecting bodily fluids for testing purposes highly intrusive and humiliating.⁷³ Some testing programs require observation, which is considered embarrassing and degrading by some employees.⁷⁴ Also, drug testing can detect psychiatric drugs, and disclose other information not germane to public policy issues under examination, e.g., whether an employee has had a venereal disease. Therefore, the employer has the ability to gain knowledge of private aspects of an employee's life not germane to job performance.⁷⁵ Decisions on whether a public education agency implements a drug testing program are normally left to the discretion of school officials, subject to such influences as applicable state and federal laws and collective bargaining agreements.⁷⁶

The Legal Doctrinal Framework of the Study

The framework of this study is provided by legal doctrines that can be identified in the U.S. Constitution; federal and state case law, statutes, and rules and

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ LEWIS, *supra* note 40, at 5.

regulations; and the Florida Constitution. The Fourth and Fifth Amendments to the U.S. Constitution may be implicated by college and university employee drug testing programs.⁷⁷ As identified in the literature concerning employee drug testing, doctrines and/or issues that require examination, in alphabetical order, include (1) consent,⁷⁸ (2) defamation,⁷⁹ (3) discrimination,⁸⁰ (4) due process,⁸¹ (5) educational malpractice,⁸² (6) emotional distress,⁸³ (7) equal protection,⁸⁴ (8) freedom of religion,⁸⁵ (9) *in loco*

⁷⁷ Stadler, *supra* note 5, at 329.

⁷⁸ 77 C.J.S. *Right of Privacy* §§ 6.

⁷⁹ 77 C.J.S. *Right of Privacy* § 7; see also Gregory v. Bryan-Hunt Co., 174 S.W.2d 510, 295 Ky., 345 (1942); Barber v. Time, Inc., 159 S.W.2d 291, 438 Mo. 1190 (1953); BLACK'S LAW DICTIONARY (6th ed. 1990); Rust, *supra* note 61, at 51.

⁸⁰ Stadler, *supra* note 5, at 331.

⁸¹ Rust, *supra* note 61, at 51.

⁸² JULIUS MENACKER, *SCHOOL LAW: THEORETICAL CASE PERSPECTIVES* 299 (Prentice-Hall) (1987).

⁸³ RESTATEMENT (SECOND) OF TORTS § 46(1); see also Douglas L. Stanley, *Employee Drug Testing*, 19 J. KAN. B. ASS'N 15 (January 1992).

⁸⁴ U.S. CONST. amend. XIV, § 1.

⁸⁵ U.S. CONST. amend. I.

parentis,⁸⁶ (10) invasion of privacy,⁸⁷ (11) negligence,⁸⁸ (12) probable cause,⁸⁹ (13) public safety,⁹⁰ (14) unreasonable search and seizure,⁹¹ (15) self-incrimination,⁹² (16) state action,⁹³ and (17) wrongful discharge.⁹⁴

Public safety (or public interest) has been established by the courts as a central issue in employee drug testing.⁹⁵ Employees in safety sensitive jobs may be tested in the absence of individual suspicion or probable cause.⁹⁶ Probable cause involves reasonable grounds for suspicion, supported by sufficient evidence, to cause a cautious person

⁸⁶ 67A C.J.S. *Parent & Child*, §§ 153; see also Michael L. Keller, *Shall the Truce be Unbroken?*, 12 J.C. & U.L. 418 (1985).

⁸⁷ 77 C.J.S. *Right of Privacy* § 1; see also Rust, *supra* note 61, at 51.

⁸⁸ 65 C.J.S. *Negligence* § 1(1); see also Weeks, *supra* note 26, at 516-17

⁸⁹ 79 C.J.S. *Searches and Seizures* § 74.

⁹⁰ *Id.* at 517.

⁹¹ U.S. CONST. amend. IV; see also Stadler, *supra* note 5, at 329.

⁹² U.S. CONST. amend. V.

⁹³ *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); see also William L. Schaller, *Drug Testing and the Evolution of Federal and State Regulation of Intercollegiate Athletics: A Chill Wind Blows*, 18 J.C. & U.L. 137-138 (1991).

⁹⁴ Cathcart, *supra* note 20, at 349.

⁹⁵ *Von Raab*, 109 S.Ct. 1384.

⁹⁶ *Id.*

to believe that the individual is guilty of the offense in question.⁹⁷ It has also been defined as a "reasonable ground for belief of guilt which means less than evidence which would justify conviction."⁹⁸ In contrast to the Supreme Court's ruling in *Skinner*, in which the Court determined that there was no requirement of a warrant or reasonable suspicion for employees to be tested for illicit drug use, a search of a vehicle without a warrant is considered unreasonable⁹⁹ and illegal¹⁰⁰ where probable cause does not exist.

In the absence of provisions for drug testing in substance abuse policies, governing board members and administrators of higher education institutions must be concerned with the issue of negligence, should injury to a student or staff member occur as a result of drug-related behavior. Negligence, in a colloquial sense, has been defined as "a mere absence of care or the want of ordinary care."¹⁰¹ Negligence has also been defined as "the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person

⁹⁷ *Shore v. United States*, 49 F. 2d. 519 (1931).

⁹⁸ 79 C.J.S. *Search and Seizures* § 66.

⁹⁹ *Wirin v. Horrall*, 193 P.2d 470, 85 Cal. App. 2d 497 (1948).

¹⁰⁰ *Gilliam v. U.S.*, C.A.Tenn., 189 F.2d 321 (1951).

¹⁰¹ 65 C.J.S. *Negligence* § 1(1).

suffers injury,"¹⁰² which may be more germane to the issue of employee drug testing. Injury, in a higher education environment, may involve more than physical harm and include such issues as institutional reputation¹⁰³ and educational malpractice.¹⁰⁴

The issue of negligence may have some relationship with the doctrine of *in loco parentis*, which is defined as "in the place of a parent."¹⁰⁵ A college or university that is *in loco parentis* may be defined as having "assumed the status and obligations of a parent without formal adoption"¹⁰⁶ or, in other words, is charged factitiously with a parent's rights, duties, and responsibilities.¹⁰⁷ The extent to which students can expect a legal duty of care from colleges and universities was more narrowly defined in *Bradshaw v. Rawlings*.¹⁰⁸ At issue was an institution's responsibility to control the off-campus consumption of alcoholic beverages by students. Generally, a reapportionment of responsibilities and social interests has occurred over time, making colleges and universities no longer responsible for controlling the

¹⁰² *Cole v. Delchamps Inc.*, 152 So.2d 911 (1963).

¹⁰³ *Stadler*, *supra* note 5, at 322.

¹⁰⁴ *Ellis*, *supra* note 8, at B2.

¹⁰⁵ 67A C.J.S. *Parent & Child* § 153 (1989).

¹⁰⁶ *Id.*

¹⁰⁷ BLACK'S LAW DICTIONARY (6th ed. 1990).

¹⁰⁸ *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

entire scope of campus morality.¹⁰⁹ However, a court can create a new duty if, after weighing the interest of the parties, it determines that the plaintiff should be entitled to legal protection against a defendant's conduct.¹¹⁰ This, along with the fact that some individuals are in the dual role of student and employee--under such federal programs as College Work Study (CWS) and Other Personnel Services (OPS)--may cause some relevancy to exist between the doctrine of *in loco parentis* and the issue of employee drug testing.

A search constitutes an "examination of a man's house, buildings, or premises, or of his own person, with a view to the discovery of contraband or illicit or stolen property or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged,"¹¹¹ as determined in *State v. Beck*.¹¹² The term applies to an exploratory investigation, or an invasion and quest, a looking for or seeking out.¹¹³ Seizure implies a forcible dispossession of the owner,¹¹⁴ as defined in *Hale v.*

¹⁰⁹ WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, 2ND ED. 59 (Jossey-Bass Publishers) (1989).

¹¹⁰ *Id.*

¹¹¹ 79 C.J.S. *Searches and Seizures* § 1.

¹¹² *State v. Beck*, 85 S.W.2d 1026, 1029 (1935).

¹¹³ *Id.*

¹¹⁴ *Id.*

Henkle.¹¹⁵ It is not a voluntary surrender.¹¹⁶ The Fourth Amendment to the U.S. Constitution provides that search and seizure actions must be "reasonable," upheld in *U.S. v. Jeffers*.¹¹⁷ Consent, "a voluntary yielding to the proposition of another" or a "willingness that an act or invasion of an interest shall take place,"¹¹⁸ is an issue which may nullify the seizure issue.

While a person may be subject to a reasonable search and seizure action, he or she also has a right to privacy, which has been defined as "the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity."¹¹⁹ The right to privacy, however, is not an absolute right.¹²⁰ A person may lose the right to privacy by entering into a profession that gives the public a legitimate interest in his character, affairs, or activities¹²¹--something which may have relevance to the faculty and staff of public colleges and universities. Therefore, colleges and universities face the dilemma of weighing the institution's property interests, i.e.,

¹¹⁵ *Hale v. Henkle*, N.Y., 26 S.Ct. 379 (1906).

¹¹⁶ *Id.*

¹¹⁷ *U.S. v. Jeffers*, App. D.C., 72 S.Ct. 93 (1951).

¹¹⁸ BLACK'S LAW DICTIONARY (6th ed. 1990).

¹¹⁹ 77 C.J.S. *Right of Privacy* § 1.

¹²⁰ *Id.* at § 6.

¹²¹ *Cason v. Baskin*, 30 So.2d 635 (1947).

upholding community standards and ensuring public safety, against those of the employee, i.e., the individual's right to privacy.¹²²

The Fourth Amendment to the U.S. Constitution, which was based on the English common-law principle that "a man's home is his castle,"¹²³ provides for the individual's right to privacy. The amendment was enacted to confer general rights to an expectation of reasonable privacy for persons in relation to government and to protect individuals from the unrestrained power of government officials to unfairly obtain and use information and evidence against them.¹²⁴ A person has the right to be protected from any wrongful intrusion into his or her private life that would cause outrage, mental suffering, shame, or humiliation.¹²⁵ In some cases, these rights exist even in the absence of statutory regulation.¹²⁶ An employee subject to a drug test may allege he or she has suffered defamation, the "holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community."¹²⁷

¹²² Stadler, *supra* note 5, at 332.

¹²³ MENACKER, *supra* note 82, at 262.

¹²⁴ *Id.*

¹²⁵ McGovern v. VanRiper, 43 A.2d 514, 518, 137 N.J.Eq. 24, *aff'd* 45 A.2d 842, 137 N.J.Eq. 548 (1946).

¹²⁶ 77 C.J.S. *Right of Privacy* § 1.

¹²⁷ BLACK'S LAW DICTIONARY (6th ed. 1990).

Before a court will apply constitutional protection of individual rights to a college or university, it must first make a determination on whether the institution's action is state action.¹²⁸ This determination is basically a matter of distinguishing public from private institutions.¹²⁹ In some cases, such as a public school supported by tax dollars, the distinction is clear; other cases can be nebulous.¹³⁰ In general, state action refers to claims made under the due process clause for which a private citizen is seeking damages or redress because of improper government intrusion into his life.¹³¹ In determining whether an action by a private college or university constitutes state action (within purview of the Fourteenth Amendment), a court must examine whether a sufficiently close nexus exists between the challenged action and the state.¹³² Some definition has been brought to the issue in *Powe v. Miles*,¹³³ *Wahba v. New York University*,¹³⁴ and *Rendell-Baker v. Kohn*,¹³⁵ which

¹²⁸ KAPLIN, *supra* note 109, at 18.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ BLACK'S LAW DICTIONARY (6th ed. 1990).

¹³² *Id.*

¹³³ *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

¹³⁴ *Wahba v. New York University*, 492 F.2d 96 (2d Cir. 1974).

¹³⁵ *Rendell-Baker v. Kohn*, 102 S.Ct. 2764 (1982).

provides criteria under which a private institution can be a state actor.¹³⁶

A proper search action must be conducted within the guidelines of the Fourth Amendment, which stipulates that the search must be reasonable.¹³⁷ It has been argued that two seizures are involved in drug testing. First, the employer seizes the employee to collect a sample of bodily fluid. Second, the employer seizes the sample.¹³⁸

Some protection of employees is afforded by the Fifth Amendment's due process clause.¹³⁹ While the amendment will not preclude a drug test, it may protect an employee who is terminated pursuant to a drug test and is not notified of the reasons for his firing, nor provided an opportunity to explain the test results.¹⁴⁰ State employees in good standing have a property interest in their jobs and are entitled to procedural due process before the government can legally deprive them of that interest.¹⁴¹ In the absence of due process, wrongful discharge, meaning "an at-will employee's cause of action against his former employer,

¹³⁶ *Id.*

¹³⁷ U.S. CONST. amend. IV.

¹³⁸ Stadler, *supra* note 5, at 329-330.

¹³⁹ The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

¹⁴⁰ Stadler, *supra* note 5, at 330-331.

¹⁴¹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

alleging that the discharge was in violation of state or federal anti-discrimination statutes, public policy, and implied employment contract, or an implied covenant of good faith and fair dealing,"¹⁴² may be alleged by an employee.

Justification of the Study

Florida's community colleges, according to a policy review, are concerned about drug abuse.¹⁴³ While the colleges' policies differ, the commonality is that the institutions are seeking to promote, if not ensure, a drug-free workplace.

The U.S. Supreme Court in *Skinner*¹⁴⁴ and *Von Raab*¹⁴⁵ has brought some definition to the issue. However, those cases did not involve institutions of higher education. Many questions remain unanswered. It is logical to assume that the legality of any Florida community college substance abuse policy, especially one featuring a drug testing component, could be challenged in court. Therefore, Florida community college governing boards and administrators need to be provided with information that will assist them in developing substance abuse policies that best reflect the goals and missions of their respective institutions, while

¹⁴² BLACK'S LAW DICTIONARY (6th ed. 1990)

¹⁴³ The researcher collected copies of substance abuse policies and/or related literature from the twenty-eight Florida community colleges.

¹⁴⁴ *Skinner*, 109 S.Ct. 1402.

¹⁴⁵ *Von Raab*, 109 S.Ct. 1384.

having some measure of predictability concerning potential litigation. This study is justified as an attempt to render assistance on this important and contemporary issue.

Method of the Study

The traditional methodology of legal research was employed to identify judicial reasoning relative to established legal principles and applications in relevant cases involving drug testing. This procedure included identifying relevant constitutional amendments, federal acts, state statutes, and rules and regulations. Relevant cases were compiled, and judicial reasoning in each case was analyzed.

In addition, a review of existing Florida community college substance abuse policies was conducted. Commonalities and differences in the policies were identified. An assessment of the measures institutions employed to promote, if not ensure, a drug-free workplace was made. Particular attention was paid to those institutions having a drug testing component in policy.

Community college substance abuse policies were then assessed from the perspective of the aforementioned legal analysis, which included a particular focus on U.S. Supreme Court and 11th Circuit Court decisions. The information was then used to formulate a model substance abuse policy, including a drug testing option, designed to provide Florida community college governing board members and administrators

with a resource that could be utilized in formulating or rewriting policies which address drug-free workplace issues and minimize the risk of litigation.

Definition of Terms

The primary source for the definition of all legal terms used in this study was *Black's Law Dictionary*.¹⁴⁶ A list of applicable terms and definitions appears in Appendix A of this study.

Limitations

While this study may have some applicability to higher education and, more specifically, American community colleges, it was limited to a review of Florida community college policies with a special emphasis on an analysis of 11th Circuit Court decisions. Moreover, research focused on employee drug testing and did not encompass student drug testing, although some parallels may be evident. The study was confined to an analysis of policy. It was accepted that institutional practices, based on any number of variables from community standards to institutional mores, may not reflect actual practice.

While there are several forms of drug testing, such as blood, breath, saliva, polygraph, optical, and/or hair analysis,¹⁴⁷ this study focused exclusively on urinalysis.

¹⁴⁶ BLACK'S LAW DICTIONARY (6th ed. 1990).

¹⁴⁷ Stadler, *supra* note 5, at 322-324.

All cases, educational literature, and law reviews cited involve urinalysis, rather than addressing the spectrum of drug testing methodologies.

Organization of the Study

In Chapter II, a literature review on topics providing background for the rationale and research of the study is presented. A review of articles on the legal implications of drug testing is included. Applicable legal doctrines are discussed.

The methodology of the research is described in Chapter III. Explained are the traditional methodology of legal research and the procedure of legal analysis when comparing applicable doctrines to Florida community college substance abuse policies. Also explained is the formulation of a model community college substance abuse policy and the standards of adequacy for legal research.

An identification of relevant federal and state cases and an analysis of judicial reasoning are provided in Chapter IV. In Chapter V, a model Florida community college employee substance abuse policy and accompanying drug screening option are presented, as well as recommendations for further research. The model policy was designed to assist Florida community college governing board members and administrators in redesigning current policies or formulating new policies for better practice.

CHAPTER II LITERATURE REVIEW

A review of the literature concerning drug testing provided the background for this study, which was conducted for the purpose of developing a model employee substance abuse policy for the Florida community college system. This review focused on two areas: (1) major court cases and federal and state laws relating to drug testing; and (2) educational literature and law reviews on the subject. While the literature on drug testing abounds, including numerous articles on student drug testing, little has been written specifically about drug testing of college and university employees. This review, therefore, was generally limited to court cases and literature which examined employee drug testing in a broader context. The knowledge gained from this review provides an understanding of the concepts and issues employed in the analysis of data in this study.

Incidence, Cost and Effectiveness of Employee Drug Testing

A 1992 study by the American Management Association (AMA) revealed that 75 percent of the companies that responded to a nationwide survey (n=1,200) engaged in employee drug testing.¹ That figure represented an 18

¹ BNA DAILY REPORT FOR EXECUTIVES, No. 66, April 6, 1992, at A-20.

percent increase over the previous year.² In addition, the percentage of employers who said drug testing is effective grew to 82 percent in 1991 from 50 percent in 1987 when the AMA survey was first conducted. The "test-positive" ratios for employees dropped from 2.7 percent in 1991 from 4.2 percent in 1990. For job applicants, the test-positive rate has fallen to 4.6 percent in 1991 from 5.8 percent in the previous years.³

The research suggests that two factors are reducing the test-positive rate, according to Eric Greenberg, director of the 1992 AMA survey. Greenberg said, "Companies are casting a wider net with universal and random testing, causing lower test-positive rates, and corporate education and employee assistance programs are effective in cutting employee drug use." As more employees are tested for reasons other than suspicion of use, the test-positive rate falls.⁴

While testing job applicants is the most common type of test performed by employers, the fastest growing type is random testing of all employees.⁵ In 1987, the AMA survey indicated that only 2.6 percent of those surveyed conducted random tests. By 1990, that figure had vaulted to 20.3

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Douglas L. Stanley, *Employee Drug Testing*, J. KAN. B. ASS'N. 19 (1992).

percent⁶ and to 27.8 percent the following year.⁷ In another 1990 survey, 39 percent of 922 Fortune 500 officials reported that they engaged in substance abuse testing. Of that 39 percent, 88 percent tested job applicants; 52 percent tested employees based on suspicion; 22 percent tested after accidents; and 12 percent conducted random testing.⁸

The evidence indicating substantial savings to firms that engage in drug testing is considerable; however, drug testing is much-maligned.⁹ Unions frequently criticize the practice, arguing that the low percentage of confirmed positive tests demonstrates that few employers have serious drug problems. As an example, a review of the results of drug tests conducted by fourteen major railroad companies in 1990 showed that only 1.2 percent of the tests came back positive. Only 3.2 percent of those tested after an accident tested positive. Moreover, only 2.2 percent of those tested on the basis of individual suspicion tested positive.¹⁰

⁶ BNA DAILY REPORT FOR EXECUTIVES, No. 68, April 9, 1991, at A-2.

⁷ BNA DAILY REPORT FOR EXECUTIVES, *supra* note 1.

⁸ Andrew Blum, *State Drug Test Rules Are Varied; Some Are Permissive; Others Regulate Strictly*, 14 NAT'L L. REV. 1, col. 1 (1991).

⁹ BNA DAILY REPORT FOR EXECUTIVES, No. 16, Jan. 24, 1991, at A-2.

¹⁰ BNA DAILY REPORT FOR EXECUTIVES, No. 82, Apr. 29, 1991 at A-11.

Another sharp criticism of drug testing is its costs.¹¹ On March 2, 1991, Rep. Jerry Sikorski, chairman of the House Post Office and Civil Service Subcommittee on Civil Service, released a report that concluded that drug testing of federal employees was costing almost \$77,000 per employee testing positive. Of 28,872 federal employees tested between April 1, 1989 and March 31, 1990, only 153 (0.5 percent) tested positive.¹²

As to whether Americans desire drug testing in the workplace, a 1990 poll conducted by the National Law Journal revealed that only 10 percent of the respondents (n=803 Americans selected at random) believe that drug testing constitutes an invasion of privacy.¹³ Three-fourths of those polled favor either mandatory drug testing for all workers or for those involved in public safety, such as police, pilots, and nuclear plant operators. Older and less educated Americans tended to favor drug testing more than younger adults and/or those who have attended college. Ironically, the poll indicated that the respondents were overwhelmingly against other forms of employer intrusions into employees' privacy. In an April 1990 poll (n=2,254) conducted by Louis Harris and Associates and Alan F. Westin, a Columbia

¹¹ Stanley, *supra* note 5, at 2.

¹² BNA GOVERNMENT EMPLOYEE RELATIONS REPORT, VOL. 29, No. 1405, Mar. 11, 1991, at 289.

¹³ Randall Sampson, *Many Americans Find Bias at Work, But, According to Poll, Few Have Taken Formal Action*, 12 NAT'L L. J. 2,3 (1990).

University professor, 83 percent of the respondents indicated they believe employers should have the right to conduct pre-employment drug testing, and 66 percent indicated they believe employers should be permitted to conduct random drug testing of existing employees.¹⁴

The Pre-1989 Evolution of Fourth Amendment Jurisprudence

The U.S. Supreme Court decided two seminal cases involving employee drug testing on the same day, March 21, 1989. Those cases, *Skinner v. Railway Labor Executives' Ass'n*,¹⁵ and *National Treasury Employees Union v. Von Raab*,¹⁶ provide the legal framework on which many lower court drug testing cases have since been decided.¹⁷ To gain a greater understanding of the drug testing issue, however, some discussion of pre-*Skinner* and *Von Raab* cases is appropriate.

The wording of the Fourth Amendment in regard to search and seizure actions related well to colonial and post-revolutionary times, as search techniques were physical and

¹⁴ Ted J. Rakstis, *An Employees Right to Privacy?*, *KIWANIS MAG.* 33 (June/July 1991).

¹⁵ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402 (1989).

¹⁶ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989).

¹⁷ Jana H. Carey, *Drug and Alcohol Testing in the Workplace - State of the Art 1992*, *AM. L. INST.* 994 (December 3, 1992).

direct.¹⁸ A search was defined as a physical trespass to a constitutionally protected area, e.g., persons, houses, papers, and effects.¹⁹ Since peoples' work revolved around farms or homes the protection of property interests also served to guard privacy interests. Warrants were generally required to search houses, offices, carriages, and saddlebags or to examine persons and their effects.

Constitutional opinions of the nineteenth and early twentieth centuries regarding search and seizure actions reflected an absolutist philosophy.²⁰ Jurists of that era employed an analysis that examined absolute differences in the kind of interests involved, not in degree.²¹ The language of the Fourth Amendment, with its warrant and probable cause requirements, tends to support an absolutist approach.²² The first case that altered the absolutist approach was Carroll v. United States.²³ In Carroll, the

¹⁸ Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 AM. BUS. L. J. 627 (Winter 1992).

¹⁹ *Id.*; see also *People v. Carlson*, 677 P.2d 310, 316 (1984); *State v. Woodall*, 241 N.E.2d 755, 757 (1968); *People v. Harris*, 256 C.A.2d 455 (1967); *People v. Carroll*, 299 N.E.2d 134, 140 (1973); *People v. Harfmann*, 555 P.2d 187, 189 (1976); *Vargas v. State*, 542 S.W.2d 151, 153 (1976); *Bush v. State*, 112 Cal.Rptr. 770 (1974); *People v. Thiret*, 685 P.2d 193, 200 (1984).

²⁰ Laura A. Lundquist, *Weighing the Factors of Drug Testing for Fourth Amendment Balancing*, GEO. WASH. L. REV. 1152 (June 1992).

²¹ *Id.*

²² *Id.*

²³ *Carroll v. United States*, 267 U.S. 132 (1925).

Court stated, "The Fourth Amendment does not denounce all searches or seizures, but only those that are unreasonable."²⁴

Carroll represented the first time that the Court employed a balancing test to determine reasonableness, stating that:

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.²⁵

In effect, the advent of balancing tests increased the government's power to search and seize.²⁶

Another important case in the evolution of the drug testing issue is *Camara v. Municipal Court*,²⁷ in which a city housing department's routine annual inspection was ruled reasonable without a warrant or individual probable cause after the Court balanced the need to search against the intrusion therein. In *Camara*, the Court established that the inspections were not "personal in nature" and involved "a relatively limited invasion of the urban citizen's privacy."²⁸ Moreover, the Court validated the government's

²⁴ *Id.*

²⁵ *Id.*

²⁶ Lundquist, *supra* note 20, at 1153.

²⁷ *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967).

²⁸ *Id.*

interest in preventing and abating all dangerous conditions in the city housing project.

Warrantless searches of an individual for criminal evidence were ruled reasonable by the Court in *Terry v. Ohio*.²⁹ The Court allowed that "reasonable suspicion," a standard lower than probable cause, was all that was required of a police officer in a brief "stop and frisk" action.³⁰ It was reasoned that the government's interest in effective crime prevention and the safety of a police officer (in searching for weapons) outweighed the interests of the individual who endures a brief intrusion upon his or her sanctity.³¹

In *United States v. Martinez-Fuerte*,³² the Court determined that short interrogative stops at permanent border checkpoints, in the absence of a warrant or individualized suspicion, were reasonable. The Court found that the government's interest in controlling the flow of illegal aliens outweighed the limited intrusion upon the person.³³ The first non-criminal exception to Fourth Amendment warrant and probable cause requirements was

²⁹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

³⁰ *Id.*

³¹ *Id.*

³² *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074 (1976).

³³ *Id.*

recognized by the Court in *O'Conner v. Ortega*.³⁴ In *O'Conner*, the Court adopted Justice Harry Blackmun's proposed standard to invoke ad hoc balancing only when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."³⁵ The Court recognized the special need of an employer in completing the government agency's work in a prompt and efficient manner and said it outweighed the privacy expectation of the employee.

Public School Cases

A review of drug testing cases revealed that few involve public school employees. Rather, most drug testing cases involving educational entities, whether secondary or post-secondary education, concern students.³⁶ Seven significant drug testing cases involving secondary and/or higher education have been *Georgia Association of Teachers v. Harris*;³⁷ *Jones v. McKenzie*,³⁸ *Patchogue-Medford Congress*

³⁴ *O'Conner v. Ortega*, 480 U.S. 709 (1987).

³⁵ *Id.*

³⁶ For additional analysis on student searches see *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991); *Cornfield By Lewis v. Consolidated High School District No. 230*, 991 F.2d 1316 (7th Cir. 1993); *State v. Serna*, 86 P.2d 1320 (Ariz.Ct.App. 1993).

³⁷ *Georgia Association of Teachers v. Harris*, 749 F. Supp. 1110 (1990).

³⁸ *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); for discussion of this case see "Public Safety" section of this chapter.

of Teachers v. Board of Education,³⁹ Brooks v. East Chambers Consolidated Independent School District,⁴⁰ Schaille v. Tippecanoe County School Corporation,⁴¹ Anable v. Ford,⁴² and Odenheim v. Carlstadt-East Rutherford Regional School District.⁴³ Decisions in these cases demonstrate the seeming inconsistencies of various courts in addressing the issue of drug testing. Georgia Association of Educators v. Harris is of particular interest for purposes of this study because it was decided by a court in the Eleventh Judicial Circuit, of which Florida is a part. The case, heard by the United States District Court, Northern District of Georgia, concerned mandatory, suspicionless drug testing for all applicants for state employment. The teachers' union sued the State of Georgia, the State Board of Education, and the Board of Regents, requesting declaration that the state's Applicant Drug Screening Act⁴⁴ be declared unconstitutional and permanently enjoined against enforcement. The district court held that (1) the state's generalized interest in the

³⁹ Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 66 (1987).

⁴⁰ Brooks v. East Chambers Consolidated Independent School Dist., 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

⁴¹ Schaille v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

⁴² Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985).

⁴³ Odenheim v. Carlstadt-East Rutherford Regional School Dist., 211 N.J. Super. 54, 510 A.2d 709 (1985).

⁴⁴ No. 1450 (1990), Georgia Laws 2064.

integrity of its workforce was not sufficient to outweigh the applicants' Fourth Amendment rights, and thus the Act violated both the Fourth and Fourteenth amendments of the United States Constitution; and (2) the state was free to drug test job applicants as permitted by the balancing test set forth in *Von Raab*.⁴⁵ The court granted permanent injunction and struck down the Act as unconstitutional.⁴⁶

Of particular note in the case was that the court held the state's sole rationale for drug testing was its generalized interest in ensuring the integrity of the workplace. The court stated that even if a job applicant has a lesser privacy expectation than an existing employee, the state's interest was still not sufficient to outweigh the applicants' Fourth Amendment rights. It is also interesting to note that the court stated that the fact that the state required urinalysis of job applicants absent search warrants or reasonable suspicion did not make the Act unconstitutional. Rather, the Act's constitutionality hinged on application of the balancing test between the applicants' rights to privacy versus the state's interests.⁴⁷

In *Patchogue*, an appeals court held that a school district's policy mandating all probationary teachers submit to urinalysis violated both state and federal

⁴⁵ *Von Raab*, 109 S.Ct. at 1390.

⁴⁶ *Harris*, 749 F.Supp. at 1110.

⁴⁷ *Id.*

constitutions.⁴⁸ The court rejected the school district's claim that the drug test did not involve a search and that an individual has no reasonable privacy expectation with regard to urination because urine is a waste product that must be periodically expelled from the body.⁴⁹ In *Brooks*, the court prohibited the implementation of a plan to test all students in grades six through twelve as a condition of participating in extracurricular activities. The *Brooks* court held that the school presented no evidence of any extraordinary circumstances sufficient to justify such a broad invasion of privacy.⁵⁰ Also noteworthy in *Brooks* was that the court ruled that urinalysis is a search which infringes on reasonable expectations of privacy.⁵¹ Conversely, in *Schai11*, the court found that the school district's across-the-board drug testing of student-athletes was permissible. The court found that the students had impliedly consented to testing because it had been a long-established part of the medical examinations required for participation in athletics.⁵²

As is consistent in most, if not all, drug testing cases, the doctrine of reasonableness is a central issue in

⁴⁸ *Patchogue*, 70 N.Y.2d, at 63-63.

⁴⁹ *Id.* at 67-68.

⁵⁰ *Brooks*, 730 F.Supp 759.

⁵¹ *Id.*

⁵² *Schai11*, 864 F.2d 1309.

testing in public schools.⁵³ In *Anable*, the court invalidated the school district's policy of requiring a student to urinate into a tube in the presence of an adult school official of the same sex. The students who were tested had been in a restroom that later smelled of marijuana, but were not tested until several days following the suspicious activity. The court held that even if the examination had been conducted immediately after the suspicion arose, the test was nevertheless overly intrusive in a school setting. The court found that there were less intrusive means for school officials to establish whether the subjects had engaged in wrongdoing, such as the smell of the restroom and interrogation of the students.⁵⁴ Similarly, in *Odenheim*, the court invalidated a school policy requiring urinalysis of all high school students, finding that other, less intrusive school policies existed for combating substance abuse. The court noted that even "purely medical" testing by school officials is subject to the restrictions of the U.S. Constitution.⁵⁵

In general, courts weigh the school's interests in maintaining order and a drug-free environment against the

⁵³ JOHN F. LEWIS, ET AL., *DRUG AND ALCOHOL ABUSE IN THE SCHOOLS: A PRACTICAL GUIDE FOR ADMINISTRATORS AND EDUCATORS FOR COMBATTING DRUG AND ALCOHOL ABUSE* 21 (National Organization on Legal Problems of Education) (1992).

⁵⁴ *Anable*, 653 F.Supp. 22.

⁵⁵ *Odenheim*, 211 N.J.Super. 54.

student's right to privacy.⁵⁶ What is reasonable becomes a fact-specific inquiry.⁵⁷ Court decisions in public school cases suggest that a school district should restrict testing to only those situations where a high probability that the student is engaging in drug abuse exists, and there is no other means of obtaining concrete evidence which would support disciplining the subject.⁵⁸

Higher Education Cases

Already discussed has been Georgia Association of Educators v. Harris,⁵⁹ which involved higher education in that the Georgia Board of Regents was named as a defendant in the case. Therefore, higher education employees were impacted to some degree by the ruling. *Harris* notwithstanding, most of the noteworthy drug testing cases in higher education have involved student-athletes and the National Association of Intercollegiate Athletics' (NCAA) urinalysis program.⁶⁰ The most prominent of these is

⁵⁶ Lewis, *supra* note 53, at 21.

⁵⁷ *Id.*

⁵⁸ *Id.* at 22.

⁵⁹ *Harris*, 749 F.Supp. 1110.

⁶⁰ At its 1990 annual convention in Dallas, Texas, the National Collegiate Athletic Association instituted a year-round drug testing program by urinalysis as a pre-condition to participating in intercollegiate sports competition, without regard as to whether a basis exists for suspecting individual illegal drug use.

University of Colorado v. Derdeyn,⁶¹ in which the U.S. Supreme Court on May 2, 1994, let stand without comment the Colorado Supreme Court's November 1993 ruling that the university's mandatory drug testing program violated athletes' rights to privacy. The university had ceased random testing in 1989, but appealed the case to the Colorado Supreme Court because, in a trial of the legality of the program, the university would not agree never to reinstate random testing. The U.S. Supreme Court's decision not to review the case could result in the abolition of similar drug-testing programs at other public universities if they are challenged.⁶²

In *Derdeyn*, the plaintiff, a student-athlete, challenged the state university's mandatory drug testing program, which involved a pre-test, called an REE (Rapid Eye Exam) to determine if an athlete should be subject to urinalysis. The REE consisted of (1) measuring pupil size with a card called a "pupillometer;" (2) testing the pupil's reaction to light; (3) observing whether involuntary jerking of the eye (nystagmus) was present; and (4) measuring the ability to maintain a properly fixed stare at an object brought within 18 inches to one inch away from the subject's nose (convergence).⁶³ Failure to pass any two

⁶¹ *University of Colorado v. Derdeyn*, 114 S.Ct. 1646 (1994).

⁶² *Side-lines*, CHRON. HIGH EDUC., May 18, 1994, at A34.

⁶³ C. Claude Teagarden, *Suspicionless Punitive Urinalysis Testing of College and University Student-*

of the four tests, as administered by a team trainer, was deemed "reasonable suspicion" to conduct a urine test.⁶⁴

The District Court, Boulder County, held that the Fourth Amendment of the U.S. Constitution as well as Article II, Section 7, of the Colorado Constitution were applicable to the university's drug testing program.⁶⁵ The court opined that the search provisions of each constitution were similar, but that Article II, Section 7 of the state constitution protected privacy interests left unprotected by the federal instrument. The court further held that the consent given by the university's students was not voluntary and was, indeed, coerced because of the potential denial of a benefit, athletic participation. Moreover, the court held that while the University of Colorado's program represented a sincere attempt at drug abuse prevention, "its merits must not be allowed to dull the vigilant defense of the values protected by the (federal) Constitution."⁶⁶ The district court permanently enjoined both the urinalysis and the REE as unconstitutional under the federal and state provisions.

Athletes, 65 EDUC. L. REP. 1006, 1007 (1991). Also, statistics have shown that the REE, as a valid indicator of suspicion of drug use, is incorrect 97 to 98.5 percent of the time.

⁶⁴ *Id.* at 1007.

⁶⁵ 86 C.V. 2245, District Court, County of Boulder, Division 3, State of Colorado, August 22, 1989.

⁶⁶ *Id.*

Upon appeal, the Court of Appeals affirmed in part and reversed in part, and certiorari was sought.⁶⁷ The Colorado Supreme Court subsequently ruled in November 1993 that, in the absence of voluntary consent, the university's random, suspicionless urinalysis drug testing of student-athletes was an unconstitutional search action. The court stated that the obtaining of monitored urine samples constituted a substantial invasion of privacy not justified by any important government interest. Further, the court held that the university did not obtain valid consent for testing because consent was a condition of participation in athletics, therefore, coerced.⁶⁸

The NCAA and State Action

A fundamental question regarding the NCAA's drug testing program has been whether the NCAA is a state actor.⁶⁹ This is an important doctrinal issue because in order for an individual to challenge drug testing on the grounds that it violates certain constitutional guarantees, it must first be shown that testing is state action⁷⁰ and

⁶⁷ D. Lederman, *State Appeals Court Upholds Ban on Random Drug Testing at University of Colorado*, 38 CHRON. HIGH EDUC. at 36.

⁶⁸ 863 P.2d 929 (Colo. 1993).

⁶⁹ Annette Gibbs, *Drug Testing and College Athletes: Conflicts Among Institutions, Students, and the NCAA*, 67 EDUC. L. REP. 4 (1991).

⁷⁰ *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); see also *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

that the action deprives him or her of rights, privileges, or immunities secured by the U.S. Constitution.⁷¹ The courts have not acted consistently on this issue. It was once held that state action encompassed any organization associated with or performing the functions of government.

In regard to the NCAA's status, an early leading case was *Parish v. NCAA*.⁷² In *Parish*, the NCAA had imposed sanctions on Centenary College for granting eligibility to several basketball players who did not qualify under the NCAA's then 1.600 rule. The court rejected the NCAA's argument that it is a private association not subject to the U.S. Constitution. The court determined that the NCAA "by taking upon itself the role of coordinator and overseer of college athletics--in the interest of both of the individual student and the institution he attends--is performing a traditional government function."⁷³

However, with the Supreme Court's decision in *Rendell-Baker v. Kohn*,⁷⁴ that logic began to change. *Rendell-Baker* involved a private institution, and the Court held that the school's operation was not a traditionally exclusive state

⁷¹ *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

⁷² *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975).

⁷³ *Id.* at 1032-33.

⁷⁴ *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d. 418 (1982).

function. Subsequently, in *Arlosoroff v. NCAA*,⁷⁵ the plaintiff challenged the actions of Duke University (a private institution), and the court held that the NCAA's actions were not state functions.

More recently, the case of *NCAA v. Tarkanian*,⁷⁶ specifically addressed the state action issue. *Tarkanian* examined "whether the actions of the University of Nevada-Las Vegas (UNLV), in compliance with NCAA rules and recommendations, constituted state action."⁷⁷ Justice Stevens, in writing the majority opinion, stated that UNLV was unquestionably a state actor, but that the NCAA is a private agency. The Supreme Court, on those grounds, reversed an earlier decision of the Nevada Supreme Court that had determined that UNLV and the NCAA acted jointly to deprive Coach Jerry Tarkanian of liberty and property interests, making both parties state actors.

A major factor in the Supreme Court's reasoning was UNLV was not compelled to be a member of the NCAA, that it could withdraw its membership at any time. *Tarkanian* clearly demonstrates that rules promulgated by the NCAA and their enforcement constitute private conduct, rather than state action.⁷⁸

⁷⁵ *Arlosoroff v. NCAA*, Supra 746 F.2d at 1021-22

⁷⁶ *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).

⁷⁷ *Id.*

⁷⁸ C. Claude Teagarden, *supra* note 63, at 1011.

Student-Athlete Drug Testing Cases Preceding the U.S.
Supreme Court's Decision in *Derdeyn*

Pre-dating the Supreme Court's 1994 ruling in *Derdeyn*,⁷⁹ the doctrinal issue of right to privacy has been consistently addressed in drug testing cases involving student-athletes in higher education.⁸⁰ Because of *Tarkanian*, some students have brought claims against their institutions, the NCAA, or both under state constitutions and statutes. In the July 1987 case of *O'Halloran v. University of Washington*,⁸¹ a King County, Washington, Superior Court ruled the university's NCAA-inspired drug-testing program unconstitutional because it permitted testing without individualized, reasonable suspicion. The plaintiff was a female member of the university's track team who refused to sign the NCAA consent form. In her case, the court issued a temporary restraining order, exempting the university's students from drug-testing, and directed the NCAA to take no action against the university for not participating in post-season drug-testing programs. The court opined that the NCAA's program suffered from "even more constitutional deficiencies than does the University of Washington's program."⁸² The NCAA, which was joined by the University of Washington as a third party

⁷⁹ *Derdeyn*, 114 S.Ct. 1646 (1994).

⁸⁰ Gibbs, *supra* note 69, at 5.

⁸¹ *O'Halloran v. University of Washington*, 672 F. Supp. 1380 (W.D. Wash. 1987).

⁸² *Id.*

defendant, was later successful in removing the case to federal court. At the trial, the university struck a compromise by revising its testing program so that only those athletes suspected of drug use would be tested.

The plaintiff's motion to remand the case to the state court was denied, and her constitutional claim against the NCAA's drug-testing program was tried on a motion for preliminary injunction to stop the NCAA from barring her from competition in the indoor track season. The U.S. District Court held that while the NCAA's urinalysis program was a Fourth Amendment search, the NCAA's employment of urine testing to enforce its 1987-88 program did not unreasonably infringe upon athletes' privacy. The court said that the invasion of the plaintiff's privacy interest by the urine collection procedures are "outweighed by the compelling interest of the university and the NCAA in protecting the health of student-athletes, reducing peer pressure and temptations to use drugs, ensuring fair competitions for student-athletes and the public, and educating about deterring drug abuse in sports competition."⁸³

The case was appealed to the Ninth Circuit, which reversed the district court decision and remanded the case to the Washington State Trial Court on the basis of a lack of subject matter jurisdiction by the federal court. The

83 *Id.*

case was ultimately settled when the NCAA issued a public statement, saying that no evidence that the plaintiff ever used drugs existed.

Another prominent higher education drug testing case is *Hill v. NCAA*.⁸⁴ The plaintiff claimed that the NCAA's drug testing requirements constituted an illegal search and violated her express right to privacy, as guaranteed under the California Constitution. The plaintiff had refused to sign the university's drug testing consent form.

The plaintiff was granted a preliminary injunction, allowing her to attempt to qualify for NCAA championship events without submitting to a drug test. The court employed the following test to determine whether an invasion of privacy had occurred, stating that an invasion would be upheld only if (1) it is made to serve a compelling interest; (2) it is necessary to further that purpose; (3) it is narrowly drawn to assure maximum protection of the constitutional interests at stake; and (4) no less intrusive means to achieve the interest exists.⁸⁵

The court ruled that the NCAA's drug tests were unconstitutional because an invasion of privacy existed. The court stated that the invasion was likely to reveal irrelevant and personal information about the plaintiff. The court further criticized the NCAA drug testing program

⁸⁴ *Hill v. NCAA*, 273 Cal.Rptr. 402 (Cal.App. 6 Dist. 1990).

⁸⁵ *Id.*

because it was not tailored narrowly enough so as to accomplish its goals with minimal intrusiveness.

The NCAA appealed; subsequently, the appeals court ruled in favor of the plaintiff, stating that the NCAA drug-testing program represented an unconstitutional invasion of privacy. The court issued a permanent injunction that indefinitely exempted all Stanford athletes from testing.⁸⁶ The California Court of Appeals upheld the lower court decision, but a petition for review was granted.⁸⁷ Stanford University President Donald Kennedy opined the court's decision vindicated "Stanford's belief that student-athletes should be treated like other students."⁸⁸

The NCAA ultimately won a major victory when the case was reviewed by the Supreme Court of California, which rendered a decision January 28, 1994.⁸⁹ The California Supreme Court held that (1) the privacy initiative of the California Constitution embodies right of action against non-governmental entities; (2) the privacy initiative of the state constitution applies to the NCAA; (3) not every assertion of a privacy interest under the Privacy Initiative of the State Constitution needs to be overcome by a

⁸⁶ Hill v. NCAA, No. 619209 (Cal. Super., Santa Clara County, August 10, 1988).

⁸⁷ Hill v. NCAA, 273 Cal.Rptr. 402 (Cal.App. 6 Dist. 1990).

⁸⁸ Teagarden, *supra* note 63, at 1004-1005.

⁸⁹ Hill v. NCAA, 865 P.2d 633, 26 Cal.Rptr.2d 834 (1994).

compelling interest; and (4) the NCAA's drug testing policy involving monitoring of urination, testing of urine samples, and inquiry does not violate constitutional right to privacy. Therefore, the decision was reversed and remanded.

Another notable invasion of privacy higher education urinalysis case is *Bally v. Northeastern University*.⁹⁰ While California grants explicit rights to privacy in its state constitution, Massachusetts legislation goes beyond that in granting the right to privacy both explicitly and implicitly. The Massachusetts Civil Rights Act offers citizens a broader right to privacy than does the U.S. Supreme Court in that it is an express right, and also in the sense that it includes private party actions and state actions.⁹¹

The plaintiff, a member of both the Northeastern track and cross-country teams, initially signed both the university's and the NCAA's consent forms on drug testing. The plaintiff, however, revoked his consent in March 1987 and refused to sign the 1987-88 forms. Northeastern then declared the plaintiff ineligible to participate. The plaintiff claimed that the drug-testing program violated both his civil rights and right to privacy under Massachusetts General Law.

⁹⁰ *Bally v. Northeastern University*, 403 Mass. 713, 532 N.E.2d 49 (1989).

⁹¹ Gibbs, *supra* note 69, at 6.

The plaintiff did not attempt to establish state action, as Northeastern is a private university. The plaintiff was granted summary judgment on both counts by the Superior Court of Suffolk County, but on Jan. 9, 1989, the Supreme Judicial Court of Massachusetts reversed the decision. The court ruled that for the plaintiff to have been successful, he would have to have shown that Northeastern's drug testing program constituted interference via "threats, intimidation, and coercion."⁹² The court reasoned that the legislature, by reaching private party actions, never intended to create "a vast constitutional tort."⁹³ The court stated that the Massachusetts Civil Rights Act was intended to provide a remedy for racial or sexual harassment, rather than addressing such claims as the plaintiff's. The court differentiated the plaintiff's claim from previously successful privacy claims on the grounds that the plaintiff's case did not involve the public disclosure of private information.

On the same day the *Bally* decision was rendered the court ruled oppositely on a somewhat similar case, *Horsemen's Benevolent v. State Racing Commission*.⁹⁴ *Horsemen's* also involved random drug testing, but the court held that since the case involved a public institution (the

⁹² *Bally*, 403 Mass. 713, 532 N.E.2d 49.

⁹³ *Id.*

⁹⁴ *Horsemen's Benevolent v. State Racing Comm.*, 403 Mass. 692, 532 N.E.2d. 644 (1989).

racine commission) that *Bally* and *Horsemen's* "emphatically differ as to applicable law and legal analysis."⁹⁵

Therefore, had Northeastern been a public institution, the result would have presumably been the same as in *Horsemen's* that the NCAA drug-testing policy would, thus, be a violation of the Massachusetts Constitution.

Bally suggests that, in addition to providing their own privacy laws, states can interpret those provisions however they choose. Therefore, two states may have identical laws, but each may interpret right to privacy in its own unique way.⁹⁶

The differing outcomes of such cases as *Hill* and *Bally* demonstrate the legal limbo that has characterized drug-testing of higher education students. Stanford University students do not have to submit to drug tests, while Northeastern students have been denied relief altogether. Therefore, prior to the Supreme Court's ruling in *Derdeyn* on random drug testing the only truly non-debatable legal mandate in higher education drug testing cases has been that which *Tarkanian* established--that the implementation and enforcement of NCAA rules do not constitute state action.⁹⁷

⁹⁵ *Id.*

⁹⁶ *Gibbs, supra* note 69, at 6.

⁹⁷ *Id.* at 10.

Seminal Supreme Court Drug Testing Cases

Skinner v. Railway Labor Executives' Association

In both *Skinner* and *Von Raab*, the Court held that the respective agencies' drug testing programs constituted searches under the Fourth Amendment.⁹⁸ The "special needs" exception, established in *O'Conner*,⁹⁹ justifying warrantless and suspicionless searches of certain employees, was extended.¹⁰⁰ The Court employed a similar analysis in both cases, although the cases involved different drug testing programs and different factual situations.

Challenged in *Skinner* were Federal Railroad Administration regulations mandating drug testing of all train crew members and other employees who were directly involved in certain train accidents.¹⁰¹ Specifically, the regulations required drug testing after any accident resulting in fatality, release of hazardous material leading to evacuation or reportable injury, or serious property damage.¹⁰² The testing of employees who had violated certain safety rules was also at issue. The program was implemented

⁹⁸ *Skinner*, 489 U.S. at 602; and *Von Raab*, 489 U.S. at 656.

⁹⁹ *O'Conner*, 480 U.S. 709.

¹⁰⁰ *Skinner*, 489 U.S. at 620; and *Von Raab*, 489 U.S. at 666.

¹⁰¹ *Skinner*, 489 U.S. at 606, 609.

¹⁰² *Id.*

because a number of accidents in which drug use was a probable cause or contributing factor had been documented.¹⁰³

The Railroad Administration's program stipulated that both urine and blood samples be analyzed. The urine samples were collected under the supervision of employees of an independent medical facility.¹⁰⁴ After a sample was provided, the employee was requested to disclose in writing whether they had taken any medications during the preceding thirty days. That information was used to determine if a positive test could be explained by the employee's lawful use of the medication.¹⁰⁵ Test results were not to be disclosed to law enforcement officials.¹⁰⁶ Also, employees were to be permitted to respond to test results.¹⁰⁷

The U.S. Supreme Court upheld the constitutionality of the Railroad Administration's testing program, concluding that even though protections guaranteed employees by the Fourth Amendment applied, neither the finding of probable cause nor a search warrant were essential for the program to be deemed reasonable.¹⁰⁸ The Court established a balancing test to measure the individual's right to privacy against

¹⁰³ *Id.* at 606-08.

¹⁰⁴ *Id.* at 609-10, 610 n. 3.

¹⁰⁵ *Id.* at 626 n. 7.

¹⁰⁶ *Id.* at 621 n. 5.

¹⁰⁷ *Id.* at 610-11.

¹⁰⁸ *Id.* at 633.

the government's legitimate interest in seeking information.¹⁰⁹ The Court found that

in limited circumstances, where privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.¹¹⁰

In applying these principles, the Supreme Court established several legal doctrines related to drug testing. First, the Court pointed out that the employees affected by the drug testing program were engaged in "safety sensitive tasks."¹¹¹ Second, that the employees had a diminished expectation of privacy because of their participation in an industry heavily regulated by government to ensure safety.¹¹² The Court noted that the railroad employees discharged duties "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."¹¹³ Justices ruled that the government has the right to take all necessary and reasonable steps to deter hazardous employee conduct.¹¹⁴ However, they also allowed that the employee privacy interests intruded upon in the

¹⁰⁹ *Id.* at 621.

¹¹⁰ *Id.* at 624.

¹¹¹ *Id.* at 620.

¹¹² *Id.* at 627.

¹¹³ *Id.* at 628.

¹¹⁴ *Id.* at 633.

case of the railroad employees might be viewed as more significant in other contexts.¹¹⁵

National Treasury Employees Union v. Von Raab

In Von Raab, the Court addressed mandatory drug testing of U.S. Customs Service employees seeking promotion to posts directly involved in the interdiction of illicit drugs.¹¹⁶ Such positions required employees to carry a firearm and provided employees access to classified materials.¹¹⁷ Persons who already held such a position were not tested, and those promoted to that level were not retested.¹¹⁸ There had been virtually no documented drug problem in the Customs Service prior to the program being implemented.¹¹⁹ Employees who were being considered for promotion were notified in writing that their final candidacy was contingent upon the successful completion of the drug screening program.¹²⁰

An independent contractor fixed the time and place for the urine sample to be collected.¹²¹ Employees were required to produce photo identification and remove outer garments

¹¹⁵ *Id.* at 622, 628.

¹¹⁶ *Von Raab*, 489 U.S. at 660-61.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 672 n. 2.

¹¹⁹ *Id.* at 660, 673-74.

¹²⁰ *Id.* at 661.

¹²¹ *Id.*

and personal belongings prior to being tested.¹²² The employee had the option of producing the sample (which was to be placed in a tamper-proof bottle with a label showing the date and employee's specimen number) in the privacy of a restroom or behind a partition with a monitor of the same sex close at hand to listen for the normal sounds of urination and to prevent adulteration or substitution of the sample.¹²³ The employee was required to sign a chain of custody form, initialed by the monitor, and the sample was placed in a plastic bag and sealed before being forwarded to the laboratory.¹²⁴

Confirmed positive tests were to be reported to a medical review officer.¹²⁵ The employee did not have to specify that he or she was taking any medications prior to the test, but could do so in the event of a positive result.¹²⁶ Unlike the Railroad Administration's program in *Skinner*, test results could be released to any other agency, including criminal prosecutors, without employee authorization.¹²⁷ Employees who tested positive could be

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 662.

¹²⁶ *Id.* at 661 n. 1.

¹²⁷ *Id.* at 663.

discharged in the event they offered no satisfactory explanation.¹²⁸

The Court recognized that the purposes of the Custom Service's drug testing program were to deter drug use among employees eligible for advancement to certain sensitive positions and to prevent the promotion of drug users to those posts.¹²⁹ The Court saw those interests no less compelling than those it recognized in *Skinner* and substantial enough to eliminate the need for a warrant, a finding of probable cause or individual suspicion.¹³⁰

The Court justified its conclusions by recognizing (1) the need for testing of employees who would be interdicting illicit drugs or carrying a firearm;¹³¹ (2) the government's compelling interest to ensure that front-line interdicting personnel were physically fit and possessed unimpeachable integrity and judgment;¹³² and (3) the irreparable harm that would be done to the national interest "if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics."¹³³ Also, the Court asserted that, as to employees carrying

128 *Id.*

129 *Id.* at 666.

130 *Id.*

131 *Id.* at 668-71.

132 *Id.* at 670.

133 *Id.*

firearms, the public interest in safety demanded effective measures to prevent promotion of drug users to positions requiring the carrying of a firearm, even if the employees promoted to such positions were not engaged in the interdiction of drugs.¹³⁴ In general, the Court ruled that the government's compelling interest in safeguarding the nation's borders and promoting public safety outweighed the privacy interests of certain employees in the Customs Service, whose expectations of privacy were diminished because of "the special, and obvious, physical and ethical demands of these positions."¹³⁵ The Court also addressed the concern over the access of certain employees to classified materials, stating that the government has a compelling interest to protect truly sensitive information and that employees seeking promotion to jobs in which they would be entrusted to classified material could be tested.¹³⁶

Summation on Skinner and Von Raab

In *Skinner* and *Von Raab*, the Court focused on the practicality of requiring a warrant and probable cause when balancing the interests involved.¹³⁷ In *Skinner*, the Court justified the need for expeditious drug testing, without a warrant, by emphasizing the exigencies present when

¹³⁴ *Id.*

¹³⁵ *Id.* at 679.

¹³⁶ *Id.* at 677.

¹³⁷ *Id.* at 665.

determining the cause of train accidents.¹³⁸ The Court found that a warrant requirement would frustrate the government's purpose of discovery if bodily evidence could be destroyed or manipulated before the government secured a warrant.¹³⁹

As to probable cause, the Court conducted a more detailed balancing test. On the privacy side of the balance, the Court recognized the employees' substantial interest, particularly in avoiding urinalysis.¹⁴⁰ The majority opinion expressed concern that urinalysis could reveal "a host of private facts about an employee, including whether the individual is epileptic, pregnant, or diabetic."¹⁴¹ The Court also acknowledged that urinating, in itself, is an act that represents a privacy concern, normally being performed without public observation.¹⁴² However, the Court identified other factors that decreased employees' privacy expectations, among them the fact that, due to the nature of their jobs, employees should expect that their physical and mental capabilities would be of concern to their employers and the subject of some inquiry.¹⁴³ In *Von Raab*, the Court stated that

¹³⁸ *Skinner*, 489 U.S. at 623.

¹³⁹ *Id.*; see also *Carroll*, 267 U.S. at 153.

¹⁴⁰ *Skinner*, 489 U.S. at 616-18.

¹⁴¹ *Id.* at 617.

¹⁴² *Id.*

¹⁴³ *Id.* at 627; *Von Raab*, 489 U.S. at 672.

unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much of the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.¹⁴⁴

While there is a consensus that the Supreme Court's decisions in *Skinner* and *Von Raab* have lowered the reasonableness expectations of privacy enjoyed by some federal employees, the extent to which those rulings have impacted or will impact American workers remains a point of argument.¹⁴⁵ Some contend the Court has opened the door for widespread testing. Others argue that, despite lengthy discussion in *Skinner* and *Von Raab* about the economic costs of errors caused by alcohol and drug-impaired employees, the Court's decisions should be narrowly interpreted.¹⁴⁶ The Court stipulated formal guidelines specifying those employees whose positions were not safety-intensive and whose contact with classified material was by and large inconsequential.¹⁴⁷ Those who narrowly interpret *Skinner* and *Von Raab* point to the Court's reasoned and measured approach

¹⁴⁴ *Von Raab*, 489 U.S. at 672.

¹⁴⁵ Diane-Michelle Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 224 (Winter 1992).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

to the war on drugs and argue that the decisions do not represent a rubber-stamping of the federal anti-drug programs.¹⁴⁸ Of the two seminal cases, Loren Seigal, director of special projects for the American Civil Liberties Union said, "The U.S. Supreme Court's two rulings were so broadly worded that the lower courts are now struggling to interpret their meaning in specific cases."¹⁴⁹

Post-Skinner and Von Raab Cases

Neither *Skinner* nor *Von Raab* involved random drug testing. Since those cases were decided, however, there have been several lower court decisions upholding random drug testing of personnel in safety-related positions, law enforcement, or those with access to sensitive information.¹⁵⁰

¹⁴⁸ *Id.*

¹⁴⁹ Rorie Sherman, *Circuit Court Upholds Ban on Drug Testing*, 13 NAT'L L. J. 1 (February 18, 1991).

¹⁵⁰ *Dimeo v. Griffin*, 1991 U.S.App. LEXIS 18416 (7th Cir. Aug. 12, 1991); *AFGE Local 1533 v. Cheney*, 1991 U.S.App. LEXIS 20928 (9th Cir. June 13, 1991); *Railway Labor Executive Assoc. v. Skinner*, 934 F.2d 1096 (9th Cir. 1991); *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991); *Hartness v. Bush*, 919 F.2d 170 (D.C.Cir. 1990), 111 S.Ct. 2890 (1991); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990); *IBEW Local 245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), 111 S.Ct. 954 (1991); *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C.Cir. 1989); *National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C.Cir. 1989), 109 L.Ed.2d 321 (1990); *Thomson v. Marsh*, 878 F.2d 1431 (4th Cir. 1989); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989); *Bell v. Thornburgh*, 110 S.Ct. 865 (1990); See also *Stanley*, *supra* note 5, at 19.

In only a few cases have drug testing programs been ruled unconstitutional on the basis of Fourth Amendment challenges.¹⁵¹ One such case, *Taylor v. O'Grady*,¹⁵² involved drug testing of employees in the Department of Corrections of Cook County, Illinois. The Seventh Circuit Court struck down the program, holding it was too broad. The court upheld an injunction prohibiting the county from testing employees who have no regular access to the inmate population; no reasonable opportunity to smuggle drugs to inmates; and no access to firearms.¹⁵³ A like ruling was made in *Harmon v. Thornburgh*,¹⁵⁴ in which the Court of Appeals for the D.C. Circuit held that a Department of Justice requirement that all federal prosecutors and all employees having access to grand jury proceedings may be subject to random drug testing was too broad.¹⁵⁵

In *National Treasury Employees Union v. Yeutter*,¹⁵⁶ a portion of the Department of Agriculture's drug testing program was found unconstitutional. The court found that the DOA could test only where there was reasonable, articulable,

¹⁵¹ *Stanley*, *supra* note 5, at 10.

¹⁵² *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

¹⁵³ *Id.* at 1201.

¹⁵⁴ *Harmon v. Thornburgh*, 878 F.2d. 484 (D.C.Cir. 1989).

¹⁵⁵ *Id.* at 497.

¹⁵⁶ *Nat'l Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C.Cir. 1990).

and individualized suspicion of on-duty drug use or impairment; or the subject held a security or safety-sensitive position.¹⁵⁷ The court enjoined provisions of the testing program that called for those who are being tested for cause to be observed while providing a urine sample.¹⁵⁸ The court found that direct observation of the act of urination was unnecessary, as other precautions preventing the adulteration or tampering of the sample are available.¹⁵⁹

A police officer sued his employer for damages allegedly resulting from the employer's requirement that he submit to urinalysis in *Ford v. Dowd*.¹⁶⁰ The court found that, in the absence of a uniform or systematic selection of the employees to be tested, that the government may enforce drug testing of public employees only where employees are chosen on the basis of reasonable suspicion. The court held that the police superintendent could not require the plaintiff to submit to urinalysis strictly on the basis of unsubstantiated rumors that the officer associated with drug dealers.¹⁶¹

¹⁵⁷ *Id.* at 977.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Ford v. Dowd*, 931 F.2d 1286 (8th Cir. 1991).

¹⁶¹ *Id.*

In *Guiney v. Police Commissioner of Boston*,¹⁶² the Massachusetts Supreme Court ruled that non-consensual drug testing of federal law officers is a violation of police officers' Fourth Amendment privacy protections. The 4-3 decision was said to have "rejected the U.S. Supreme Court's ruling in *National Treasury Employees Union v. Von Raab*."¹⁶³ The court held that random drug tests of Boston police officers would violate their state constitutional privacy rights unless the police commissioner demonstrated a compelling reason for such tests, such as a drug problem among Boston police officers.

Educational Literature and Law Reviews

Most authors agree that the Supreme Court's decisions in *Skinner* and *Von Raab* represented a significant departure from traditional Fourth Amendment limitations on governmental searches. Disagreement arises in discussions of how much license and latitude the Court afforded employers to conduct drug testing programs. Historically, the Fourth Amendment's requirements of a warrant issued by a neutral magistrate and probable cause had been zealously guarded. *Skinner's* public safety rationale and *Von Raab's* "front line of the drug war" reasoning were not met with universal

¹⁶² 873 F.2d 1557; see also *Massachusetts: State Bar on Testing*, 14 NAT'L L. J. 6 (December 30, 1991).

¹⁶³ *Massachusetts: State Bar*, *supra* note 162, at 6 (Col. 2).

acceptance by the justices, as evidenced by the stinging dissent of Justice Antonin Scalia in *Von Raab*.¹⁶⁴ In any event, it is clear that the set of employees subject to random, suspicionless drug testing is expanding.¹⁶⁵ In the final analysis, the disparate results, the ad hoc decisions reached in seemingly analogous cases offer little guidance to those most intimately affected--employers, employees and their unions, and the attorneys charged with their representation.¹⁶⁶

Federal Regulations Associated with Drug Testing

President Reagan's issuance of Executive Order No. 12,564 on September 15, 1986,¹⁶⁷ is consistently cited as the catalyst for drug testing in the workplace.¹⁶⁸ Section I of the order is entitled "Drug-Free Workplace." The order stated that the nation's largest employer, the federal government, should be at the forefront of the campaign for

¹⁶⁴ *Skinner*, 489 U.S. at 636; see also *Von Raab*, 489 U.S. at 679.

¹⁶⁵ Austin V. Campriello, *Random Drug Testing: The Expanding Frontier*, 203 N.Y.L.J. 1 (col. 2) (June 15, 1990).

¹⁶⁶ *Id.* at 18.

¹⁶⁷ Exec. Order No. 12,564, 3 C.F.R. 224 (1986), reprinted in 5 U.S.C. § 7301 (1988).

¹⁶⁸ Vicki J. Moresi, *Drug Testing & the Fourth Amendment -- An Excessive Intrusion Upon An Individual's Right to Privacy*, TEM. L.Q. 1039 (Fall 1992); see also David S. Weinberg, *Dimeo v. Griffin: Another Random Drug Test or the Latest Infringement on the Fourth Amendment*, 87 NW. U.L. REV. 1088 (Spring 1993).

drug-free workplaces. The order stated unequivocally that drug abusers are unsuited for federal employment.¹⁶⁹ Under the order, agency responsibilities include a mandate that the head of every executive agency establish a plan for achieving the objective of a drug-free workplace with consideration of the rights of the government, employee, and the public.¹⁷⁰ Also required is a program to test for the use of illegal drugs by employees in "sensitive positions."¹⁷¹ As a result, several federal agencies mandated drug testing programs, which impacted approximately 1 million of 2.8 million civilian federal employees.¹⁷² The complete order appears in Appendix B of this study.

Executive Order No. 12,564 was followed by the Drug-Free Workplace Act of 1988.¹⁷³ (See Appendix C.) The Act requires that in order for an employer to be awarded a grant or federal contract of \$25,000 or more, the employer must certify that it will provide a drug-free workplace by

¹⁶⁹ Exec. Order No. 12,564, *supra* note 167, at § 1(c).

¹⁷⁰ *Id.* at § 2(a).

¹⁷¹ 5 U.S.C. § 7301 (1988); *see also* 3 C.F.R. at 29, "sensitive positions" include positions in which employees have access to classified information, presidential appointees, law enforcement officers, positions dealing with national security, and other functions requiring a high degree of trust and confidence.

¹⁷² Exec. Order No. 12,564, 3 C.F.R. 224 (1986), reprinted in 5 U.S.C. § 7301 (1988).

¹⁷³ 41 U.S.C. §§ 701-707 (Supp. 1991).

- (1) establishing a drug-free awareness program;
- (2) establishing a statement notifying employees about the prohibition of controlled substances in the workplace, and the sanctions imposed for such a violation;
- (3) providing a copy of the statement to each employee;
- (4) notifying each employee that employment is conditioned upon abiding by the statement and that each employee must notify the employer within five days of a drug statute conviction for a violation occurring in the workplace;
- (5) notifying the contracting or granting agency within ten days after receiving notice of an employee drug statute conviction;
- (6) imposing a sanction on the convicted employee or requiring his participation in a drug abuse assistance or rehabilitation program; and
- (7) making a good-faith effort to maintain a drug-free workplace.¹⁷⁴

Another major government response to increasing drug use in the workplace has been the Drug-Free Schools and Communities Act Amendments of 1989.¹⁷⁵ The U.S. Department of

¹⁷⁴ *Id.* at 701.

¹⁷⁵ 20 U.S.C. § 3224(a) (1989).

Education has established rules under the Act, which include the following requirements:

- (1) the annual distribution in writing to each employee, and to each student enrolled in one or more classes for any type of academic credit (except for continuing education units), regardless of the length of the student's program of study, of
 - (a) standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;
 - (b) a description of the applicable legal sanctions under local, state, or federal law for the unlawful possession or distribution of illicit drugs and alcohol;
 - (c) a description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
 - (d) a description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and
 - (e) a clear statement that the institution will impose disciplinary sanctions on students and employees (consistent with state and federal

law) and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the aforementioned standards of conduct.

- (2) A biennial review of the institution's program to determine its effectiveness and for the purpose of implementing changes to the program as needed; and the ensure that the above mentioned disciplinary sanctions are consistently enforced.¹⁷⁶

Certification of the aforementioned requirements is a prerequisite to receiving federal funds or financial assistance under the Act.¹⁷⁷ The U.S. Department of Education's rules, entitled "Drug-Free Schools and Campuses,"¹⁷⁸ promulgated under the Drug Free Schools and Communities Act Amendments of 1989,¹⁷⁹ appear in their entirety in Appendix D of this study.

In addition to the aforementioned regulations, the federal government has enacted other laws on drug testing that may or may not impact Florida's community colleges. These laws offer additional insight on the scope of the federal government's efforts to combat drugs in the

¹⁷⁶ Department of Education, 34 CFR Part 86 § 100.

¹⁷⁷ 20 U.S.C. § 3224(a) (1989).

¹⁷⁸ 34 C.F.R. Part 86.

¹⁷⁹ 41 U.S.C. §§ 701-707 (Supp. 1991).

workplace. On April 11, 1988, the Department of Health and Human Services (DHHS) promulgated regulations entitled "Mandatory Guidelines for Federal Workplace Drug Testing Programs."¹⁸⁰ These guidelines have formed the basis for government drug testing programs and offer private employers some guidance in conducting their own programs. Congress passed the Omnibus Transportation Employee Testing Act¹⁸¹ October 28, 1991. The Act requires drug and alcohol testing for certain employees in the transportation industry, such as aviation, railroad, trucking and mass transit. The Department of Defense's regulations were published September 28, 1988 and modified July 23, 1992.¹⁸² The regulations contain both mandatory and discretionary guidelines on drug testing. The regulations require a Department of Defense contractor to institute and maintain a program designed to achieve a drug-free workplace. The contractor may design his/her own program, but the regulations suggest the following:

- (1) Employee assistance programs focusing on counseling, rehabilitation, and coordination with available community resources;
- (2) Supervisor training to identify and address employee drug problems;

¹⁸⁰ 53 Fed. Reg. 11970.

¹⁸¹ 49 C.F.R. § 391.

¹⁸² 57 Fed. Reg. 32769-01.

- (3) Provision for self and supervisory referrals for drug abuse problems;
- (4) Testing for employees in "sensitive" positions, defined as those in positions (a) having access to classified information, (b) involved in national security, health, or safety, and (c) requiring a high degree of trust and confidence.

Although the Department of Defense's regulations do not explicitly require random drug testing, the agency has stated that random drug testing is necessary to implement its regulations. The regulations suggest that an employer decide who to test by considering the following:

- (1) the nature of the work performed under the contract;
- (2) the employee's duties;
- (3) the efficient use of contractor resources; and
- (4) the risk to public safety and security if the employee fails to perform his or her duties because of drug use.

Discretionary drug testing is suggested under the following circumstances:

- (1) When there is reasonable suspicion that an employee uses illegal drugs;
- (2) When the employee has been involved in an accident or an unsafe practice;
- (3) When it is part of or a follow-up to counseling or rehabilitation for illegal drug use; and

- (4) As a part of a voluntary employee drug testing problem.

The regulations also provide for a pre-employment drug testing program.¹⁸³ Other agencies that have promulgated regulations on drugs in the workplace include the Federal Aviation Administration, the United States Coast Guard, the Federal Railway Administration, the Federal Highway Administration, the Urban Mass Transportation Administration, the Research and Special Programs Administration, and the Nuclear Regulatory Commission.¹⁸⁴

Employee Challenges of Drug Testing Programs

Since the issuance of Executive Order No. 12,564,¹⁸⁵ many employees have challenged the constitutionality of drug testing on the basis of various doctrinal theories.¹⁸⁶ Most of these challenges have failed.¹⁸⁷ Many employees have argued that drug testing programs represent an unreasonable intrusion upon their privacy.¹⁸⁸ In most cases, mandatory drug testing of federal, state, municipal, and private

¹⁸³ *Id.*

¹⁸⁴ See WILLIAM D. TURKULA, *DRUG AND ALCOHOL TESTING: ADVISING THE EMPLOYER*, Appendix A (Butterworth Legal Publishers) (1993).

¹⁸⁵ 3 C.F.R. 224 (1986), reprinted in 5 U.S.C. § 7301 (1988).

¹⁸⁶ Weinberg, *supra* note 168, at 1088.

¹⁸⁷ *Id.*

¹⁸⁸ Moresi, *supra* note 168, at 1040.

employees in pervasively regulated industries has been upheld by federal and state courts.¹⁸⁹ Public safety concerns have been used to justify the testing of law enforcement officers, railway workers, truck drivers, and others in regulated industries.

As addressed in Chapter I of this study, several major doctrinal issues related to employee drug testing can be identified from educational literature and law review articles. These doctrines/issues include:

Consent

Consent may be viewed as one of the exceptions to the requirements in search and seizure law.¹⁹⁰ If an individual to be searched gives consent, whether that person has fewer rights under the Fourth Amendment is a subject of debate.¹⁹¹ In any event, an employer should have an employee sign a consent form prior to submitting to drug testing.¹⁹² However, a Florida case, *Underhill v. Publix Supermarkets*¹⁹³ demonstrates that signing a consent form does not

¹⁸⁹ Krasnow, *supra* note 145, at 2.

¹⁹⁰ See LAWRENCE F. ROSSOW, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 32 (National Organization on Legal Problems in Education) (1987).

¹⁹¹ *Id.*; for contrasting views on consent, see also *Schall*, 864 F.2d at 1319; *O'Connor*, 480 U.S. 709.

¹⁹² *Turkula*, *supra* note 184, at 4-10.

¹⁹³ *Underhill v. Publix Supermarkets, Inc.*, 610 So.2d 48; This case is discussed in greater detail in the "Florida Drug Testing Cases" section of Chapter II.

necessarily constitute acknowledgment by the employee that consent is voluntary. Where a defamation action is concerned, consent to a disclosure could serve as a defense.¹⁹⁴

In an educational context, a leading case involving the consent doctrine is *Jones v. Latexo Independent School Dist.*,¹⁹⁵ in which public school students' cars were searched after they had given consent for the search to be conducted. Drugs were discovered, and six students were suspended. The students sued, and the school district argued that the plaintiffs had given consent for the search, therefore, Fourth Amendment restrictions were not applicable. The court rejected that argument, holding that the students were afraid to not cooperate with school officials and consent, therefore, was not freely given.¹⁹⁶ Consent must be given

¹⁹⁴ See *Merritt v. Detroit Mem. Hospital*, 265 N.W.2d 124 (Mich. Ct. App. 1978); see also *Iowa v. Stanford*, 474 N.W.2d 573 (1991).

¹⁹⁵ *Jones v. Latexo Independent School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980).

¹⁹⁶ *Id.*

without duress or coercion, express or implied.¹⁹⁷ Otherwise consent becomes a Hobson's choice.¹⁹⁸ In *Semore v. Pool*,¹⁹⁹ the court held:

While plaintiff could contractually agree not to assert his right to privacy, we think it is clear that the employer could not use such an agreement to circumvent the public policy favoring privacy, and the employer could not successfully enforce such a contractual agreement if it intruded on plaintiff's right to privacy. If the intrusion violates the right to privacy, it is illegal whether or not it is pursuant to an agreement. If pursuant to such an agreement, it would be unenforceable because it would be against public policy.²⁰⁰

Defamation

The subject of a drug test may assert the experience or findings caused him or her to suffer defamation.²⁰¹ According

¹⁹⁷ See *Bumper v. N.C.*, 391 U.S. 543, 550, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968); *Feliciano v. City of Cleveland*, 661 F.Supp. 578, 594-95 (N.D. Ohio 1987); *University of Colorado v. Derdeyn*, 863 P.2d 929 (1993); *General Motors v. Blevins*, 144 F.Supp. 381, 384 (D.C.Col.) (1956); *Garritty v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 618 (U.S.N.J.); *Allstate Ins. Co. v. State Farm Mutual Automobile Ins. Co.*, 195 S.E.2d 711, 713.

¹⁹⁸ Teagarden, *supra* note 63, at 1016. "Hobson's Choice" is defined in the Second College Edition of *American Heritage Dictionary* as "An apparently free choice that offers no real alternative." [After Thomas Hobson (1544-1631), English liveryman, from his requirement that customers take either the horse nearest the stable door or none.]

¹⁹⁹ *Semore v. Pool*, 217 Cal. App.3d 1087, 1097, 266 Cal. Rptr. 880 (1990).

²⁰⁰ *Id.* at 669.

²⁰¹ *Turkula*, *supra* note 184, at 4-9.

to Restatement (Second) of Torts, Section 559, comment e, defamation claims generally result from publication of untrue information that, "tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from dealing with him."²⁰²

Written defamatory statements constitute libel; whereas, spoken defamatory statements constitute slander.²⁰³ Employers usually use truth as a defense and/or assert that the information was qualifiedly privileged.²⁰⁴ Truth is an absolute defense.²⁰⁵ Qualified privilege, when used without malice, is another defense. Abuse occurs when information is disseminated, under the guise of qualified privilege, to parties who have no legitimate need to know.²⁰⁶ *Luttrell v. United Telephone System*²⁰⁷ describes qualified privilege as

²⁰² RESTATEMENT (SECOND) OF TORTS is a publication of the American Law Institute, Washington, D.C., copyright © 1965-1989. The RESTATEMENT OF THE LAW, SECOND, 2d is "widely considered to be the most authoritative text on the state of the law." Lawyers cite to the Restatement in making legal arguments. See W.L. 1994 DER 96 d16; see also McGowen v. Prentice, 341 So.2d 55, 57 (1977); *Wolfson v. Kirk*, 273 So.2d 774, 776 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

²⁰³ RESTATEMENT (SECOND) OF TORTS § 568.

²⁰⁴ See *Merritt*, *supra* note 185.

²⁰⁵ RESTATEMENT (SECOND) OF TORTS § 581A

²⁰⁶ *Id.* at §§ 599, 600, 604.

²⁰⁷ 9 Kan. App.2d at 622, 683 P.2d at 1294 (1984).

a communication . . . made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty. The essential elements of a qualifiedly privileged communication are good faith, an interest to be upheld, a statement limited in its scope to the upholding of such an interest and publication in a proper manner only to proper parties.²⁰⁸

Some courts have ruled that a communication from a rank-and-file employee to a superior about the conduct of another employee is privileged.²⁰⁹ Also, a communication between a former employee and a prospective employer is subject to a qualified privilege.²¹⁰ Where a defamatory statement is made in a situation where there is qualified privilege, the party suffering the alleged defamation has the burden of proving not only that the statements were false, but also that there were made with malice.²¹¹ While the defamation theory is fraught with hurdles for the plaintiff in a drug testing case, it has been used successfully.²¹² Defamation actions have been recognized as occurring through self-publication when false information has been disclosed to the defamed party who in turn is

²⁰⁸ *Id.*

²⁰⁹ See *Dobbyn v. Nelson*, 2 Kan. App.2d 358, 361, 579 P.2d 721, 724, *Aff'd* 225 Kan. 56, 587 P.2d 315 (1978).

²¹⁰ See *Turner v. Halliburton Co.*, 240 Kan. 1, 10, 722 P.2d 1106, 1114 (1986).

²¹¹ See *Id.* at 8, 722 p.2d at 1113.

²¹² See *Houston B. & T.R. Co. v. Wherry*, 548 S.W.2d 743 (1976).

compelled to disclose the information to a third party, e.g., a prospective employer.²¹³

Discrimination

An employee who is terminated due to drug usage may claim he or she has a disability and, therefore, his or her firing constituted a discriminatory act. In New York, the State Human Rights Division has held that the dismissal of any employee who has a disability due to drug dependency, yet is able to perform his or her job, constitutes illegal discrimination.²¹⁴ Specifically, the state's general counsel said, "The Human Rights Law forbids discrimination against disabled persons, including drug users, who are able to perform their jobs."²¹⁵

In *Atkinson v. B.C.C. Associates Inc.*,²¹⁶ a cashier who tested positive for drug use was terminated and subsequently filed suit on the basis of discrimination. The court, however, found no grounds for a discrimination claim, stating that the plaintiff had shown no basis whatsoever that her discharge was due to a drug dependency.²¹⁷ In an

²¹³ See *Lewis v. Equitable Life Assurance Society of U.S.*, 361 N.W.2d 875 (Minn. 1985).

²¹⁴ See *Doe v. Roe Inc.*, 160 A.D.2d 255 (1990); see also Gary Spencer, *Employee's Discharge for Drug Use Held Reasonable*, 208 N.Y.L.J. 1 (col. 3) (July 20, 1992).

²¹⁵ *Doe*, 160 A.D.2d 255

²¹⁶ *Atkinson v. B.C.C. Assoc., Inc.*, 185 A.D.2d 415, 586 N.Y.S.2d 319 (1992).

²¹⁷ *Id.*

earlier case, *Doe v. Roe Inc.*,²¹⁸ however, the court ruled that a company "may be legitimately entitled to discriminate against users of controlled narcotic substances," but that drug testing programs must bear a rational relationship to "employee job performance."²¹⁹ Subsequent to *Roe*, the court in *Porcello v. General Motors*,²²⁰ ruled that the Human Rights Law of New York,²²¹ in regard to disability, applies only to those persons who are or have been addicted to drugs. A social or casual user of drugs, whether the drug of choice is marijuana or cocaine, is not disabled within the meaning of the Human Rights Law.²²² Therefore, using New York as an example, the issue of drug use as related to disability, and, therefore, a discrimination claim, appears unsettled.²²³

Two federal acts that could factor in a discrimination claim are the Federal Rehabilitation Act of 1973²²⁴ and the Americans with Disabilities Act.²²⁵ The former prohibits

²¹⁸ *Doe*, 160 A.D.2d 255.

²¹⁹ *Id.*

²²⁰ New York Human Rights Case No. 3-E-D-85-103394 (1990).

²²¹ New York Executive Law § 296[1][a].

²²² *Id.*

²²³ Jay W. Waks and Brian G. Casaratto, *Curbing Workplace Drug Use: The New York Perspective*, 203 N.Y.L.J. 1 (col. 1) (April 26, 1990); see also *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); *Johnson v. Smith*, 39 FEP 1106, 1108 (D. Minn. 1985).

²²⁴ 29 U.S.C. § 701 (codified at 34 C.F.R. § 104) (Supp. 1991).

²²⁵ 42 U.S.C. § 12114 (1990).

discrimination against handicapped individuals (including drug addicts and alcoholics). A drug addict or alcoholic, however, is not a handicapped person under the Federal Rehabilitation Act if that individual's current use of drugs or alcohol

prevents him from performing duties of the job in question or whose employment, by reason of such current drug or alcohol abuse, would constitute a direct threat to property or the safety of others.²²⁶

Any employer receiving federal financial assistance is covered by the Act's provisions. Moreover, any individual employed by such an employer has the right to institute a private cause of action if the employee feels he or she has been discriminated against on the basis of alcohol or drug dependency.²²⁷ The Act stipulates that an employer must "reasonably accommodate" employees who are drug addicts or alcoholics,²²⁸ unless such creates an undue administrative or financial burden.²²⁹

Drug testing is not prohibited under the Americans with Disabilities Act²³⁰ (ADA). In fact, the language of the Act speaks to a neutral position on drug testing. It reads:

²²⁶ 29 U.S.C. § 706(7)(b) (Supp. 1991).

²²⁷ 29 U.S.C. § 794 (1991).

²²⁸ 34 C.F.R. § 104.12(b).

²²⁹ *Id.* at § 104.12(c).

²³⁰ 42 U.S.C. § 12114 (1990).

Nothing in this title shall be construed to encourage, prohibit or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment or making employment decisions based on such test results.²³¹

Under ADA, a drug test is not considered a medical examination, rather a test to determine illegal drug use.²³² This is an important concept because inquiries by a medical review officer (MRO) as a pre-job offer function is illegal under ADA. Therefore, MRO inquiries, even after a positive drug test, may be illegal. Medical examinations, under ADA, can be mandated only if they are required of all applicants and there are significant confidentiality stipulations in place.

A job applicant who tests positive for illegal drug use, including the illegal use of prescription drugs, is not afforded any protections under ADA, provided the job denial is based on his or her illegal drug use and not a disability. A positive drug test is equated with current usage, and current users have no ADA protection. Specifically, the Act reads, "the term qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."²³³ However, when an applicant tests positive for

²³¹ ADA (P.L. 101-336), Title I - Employment, § 104(d)(2) (42 U.S.C. 12114) (1990); see also § 510(b)(3).

²³² *Id.* at § 104(d)(1).

²³³ *Id.* at § 104(a).

illegal drug use, the results are often reviewed by a medical review officer, and the applicant is given an opportunity to explain the positive test. As previously stated, such constitutes an inquiry by a medical officer, which constitutes a medical examination, which is illegal under ADA.

Some states have also recognized that drug addiction is a handicap. In *Hazlett v. Martin Chevrolet*,²³⁴ the Ohio Supreme Court held that drug addiction and alcoholism are handicaps within the meaning of the state handicap discrimination law. The scope of state laws with respect to drug addicts is basically undecided; however, it is likely state laws will be interpreted in a manner similar to the interpretation of the Federal Rehabilitation Act.²³⁵

Due Process

Where drug testing is concerned, both property and liberty interests are at stake under the Fifth Amendment,²³⁶ which guarantees that "no person shall . . . be deprived of life liberty or property, without due process of law."²³⁷ An

²³⁴ *Hazlett v. Martin Chevrolet*, 25 Ohio St. 3d 279 (1986); for additional perspectives on how states view drug addiction as a handicap see *Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm.*, 366 N.W.2d 522 (Iowa 1985); *Squires v. Labor & Industry Revise Comm.*, 97 Wis. 2d 648, 294 N.W.2d 48 (1980).

²³⁵ *Lewis*, *supra* note 53, at 16.

²³⁶ *Turkula*, *supra* note 184, at 4-4.

²³⁷ U.S. CONST., amend. V.

employee's property interest, e.g. his or her job, is unconstitutionally deprived when the government establishes then violates the employee's reasonable expectation of continued employment.²³⁸ A liberty interest can be unconstitutionally deprived when the government impugns an employee's "good name, reputation, honor, or integrity," so far as to impact the individual's ability to obtain other employment.²³⁹ Legally, the government cannot deprive an employee of a property or liberty interest unless it engages in procedural and substantive due process. Procedural due process requires that

before termination, the employee be given oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present, in person or in writing, reasons why the proposed action should not be taken.²⁴⁰

Procedural due process entails such proper procedures as providing the individual with "notice and opportunity for hearing appropriate to the nature of the case."²⁴¹

Substantive due process requires that an employee not be terminated on grounds that are either arbitrary or

²³⁸ See *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986)

²³⁹ *Turkula*, *supra* note 184, at 4-4.

²⁴⁰ 85 Op. Att'y Gen. Md. 021 at 6 (1985); see also *Bostic v. McClendon*, 650 F. Supp. 245, 251 (N.D. Ga. 1986).

²⁴¹ *Mullane v. Central Hanover & Trust Co.*, 339 U.S. 306, 313 (1950).

capricious.²⁴² Therefore, it is incumbent upon an employer who dismisses an employee on the basis of a positive drug test to make certain that fair procedural guidelines are followed and that the tests are reliable confirmatory tests.²⁴³ Some courts have held that the exclusive use of the EMIT test²⁴⁴ is sufficient to ensure substantive due process based on the test's reputed reliability.²⁴⁵ One court, however, found that the dismissal of an employee on the basis of a singular unconfirmed positive EMIT test constituted arbitrary and capricious action.²⁴⁶

Due process arguments made against government testing programs generally have alleged that tests are inaccurate or that the employee was punished without being provided an opportunity to contest the test results or explain.²⁴⁷ Most challenges under the due process theory have failed.²⁴⁸ An

²⁴² Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969).

²⁴³ Turkula, *supra* note 184, at 4-5.

²⁴⁴ EMIT® is an acronym for Enzyme-Multiplied Immunoassay Technique developed by Syva Company, Palo Alto, California.

²⁴⁵ Taylor v. O'Grady, 669 F. Supp. 1422, 1430 (N.D. Ill. 1987).

²⁴⁶ Jones, 628 F.Supp., at 1506.

²⁴⁷ See, e.g., Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987); see also Gary P. Scholick, *Issues of Workplace Privacy*, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 7 (January 1993).

²⁴⁸ See e.g., Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988); Feliciano v. City of

exception is *Burka v. New York City Transit Authority*,²⁴⁹ in which the court ruled that the Transit Authority's drug test violated the employee's right to due process because there was no adequate safeguard in testing procedures or disciplinary steps.²⁵⁰

Educational Malpractice

Some argue that if drug usage negatively impacts the quality of a faculty member's instruction, a student would have cause for a class-action suit on the basis of educational malpractice.²⁵¹ The concept of educational malpractice, like the more commonly known medical malpractice, is based on negligence in the application of professional skills and knowledge.²⁵² The plaintiff would attempt to demonstrate that the practices and/or professional decisions of the educator caused injury to the plaintiff's educational development through conduct falling below the standard expected from educators. As case law in

Cleveland, 988 F.2d 649 (6th Cir. 1993); Scholick, *supra* note 247, at 7.

²⁴⁹ 739 F. Supp. 814, 1990.

²⁵⁰ *Id.*

²⁵¹ B.G. Ellis, *Faculty Members Must Intervene*, CHRON. HIGH. EDUC., Jan. 30, 1991 at B2.

²⁵² JULIUS MENACKER, *SCHOOL LAW: THEORETICAL AND CASE PERSPECTIVES*, 299 (Prentice-Hall) (1987); see also *Peter W. v. San Francisco School Dist.*, 60 C.A. 3d 814 (1976).

this area of tort litigation is limited, so is the predictability of judicial response.²⁵³

Emotional Distress

Another theory on which plaintiffs have prevailed in a few employee drug testing cases is intentional and negligent infliction of emotional distress.²⁵⁴ According to the Restatement (Second) of Torts, Section 46(1),²⁵⁵ intentional infliction of emotional distress is evident when one, who by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another. Liability occurs when

the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.²⁵⁶

²⁵³ *Id.* For an additional perspective on educational malpractice, see *The U.S. Supreme Court Now Allows Students to Sue for Damages*, 16 SCH. L. NEWSL. 711. In the article, a recent United States Supreme Court decision is discussed. The Court set a major precedent by allowing students to sue for damages from schools and colleges and their administrators when a student is subjected to sexual discrimination, a virulent form of educational malpractice. The Court reviewed an appeal from a young female student who claimed that she was forced into a sexual relationship by a male teacher/coach while she was a student at Georgia's North Gwinnett High School. The decision sent a strong signal that administrators should develop policies to prevent faculty behavior contrary to student development.

²⁵⁴ See *Luck v. Southern Pacific Transportation Company*, 218 Cal. App.3d 1, 267 Cal. Rpt. 618, 111 S.Ct. 344 (1990); *Kelly v. Schlumberger Technology Corp.*, 849 F.2d 41 (1st Cir. 1988); see also *Stanley*, *supra* note 5, at 15.

²⁵⁵ RESTATEMENT (SECOND) OF TORTS, *supra* note 202.

²⁵⁶ RESTATEMENT (SECOND) OF TORTS, *supra* note 202, at

In jurisdictions that have recognized this theory as a cause of action, the courts generally require that the defendant has unintentionally caused emotional distress to another, resulting in illness or bodily harm, and the actor should have realized that his or her conduct involved an unreasonable risk causing the distress.²⁵⁷ Also, the actor should have known that the distress, if it were caused, might result in illness or bodily harm.²⁵⁸

In *Kelly v. Schlumberger Technology*,²⁵⁹ the employer insisted witnessing an employee provide a urine sample. The court awarded the plaintiff \$125,000, citing negligent infliction of emotional distress, and \$1 on an invasion of privacy claim.²⁶⁰ In *Luck v. Southern Pacific Transportation Company*,²⁶¹ an employee was questioned about her personal beliefs and bodily functions by an employer after the former refused to submit to urinalysis. A California court concluded that the plaintiff stated a claim for intentional infliction of emotional distress.²⁶²

§ 46(1).

²⁵⁷ *Tandy Corp., v. Bone*, 283 Ane 399, 678 S.W.2d 312 (1984).

²⁵⁸ RESTATEMENT (SECOND) OF TORTS, *supra* note 202, at § 313.

²⁵⁹ *Kelly*, 849 F.2d at 41.

²⁶⁰ *Id.*

²⁶¹ *Luck*, 111 S.Ct. at 344.

²⁶² See *Satterfield v. Lockheed Missiles and Space Co., Inc.*, 617 F. Supp. 1359 (D.S.C. 1985).

Equal Protection

The equal protection theory comes into play when an employee alleges a drug testing program has been applied only to certain employees or in certain situations.²⁶³ Generally, the courts have rejected the equal protection theory as a valid claim against drug testing programs.²⁶⁴ In *Shoemaker v. Handel*,²⁶⁵ as an example, the court found that the New Jersey Racing Commission's regulations allowing daily breathalyzer as well as random urine testing of jockeys but not of officials, trainers, and grooms did not constitute an equal protection violation.²⁶⁶ The court dismissed the equal protection argument on the fundamental principle that the state has the right to eradicate problems through a rational step-by-step process.²⁶⁷ The *Shoemaker* decision was in sharp contrast to *Dimeo v. Griffin*,²⁶⁸ in which the Seventh U.S. Circuit Court of Appeals upheld a ban on random drug testing of state-licensed racetrack employees. The *Dimeo* court stated:

There are good and valid reasons
to keep drugs out of horse racing.
But as laudable as the motivation

²⁶³ Scholick, *supra* note 247, at 7.

²⁶⁴ *Id.*

²⁶⁵ *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 1144.

²⁶⁸ *Dimeo v. Griffin*, 943 F.2d 679 (1991).

and intentions...may be in the war on drugs, they are not enough to make up for the constitutional shortcomings of the . . . rule.²⁶⁹

In Loco Parentis

The doctrine of *in loco parentis* places a legal duty on school officials to act pursuant to applicable tort law.²⁷⁰ Under the doctrine, teachers and school administrators are liable for their omission or failure to act when a student is in danger within the school setting.²⁷¹ Underlying *in loco parentis* is the theoretical supposition that parents voluntarily delegate their authority to school officials.²⁷² Thus, administrators and teachers have a duty to protect students in danger of a foreseeable risk to harm.²⁷³ The scope of a school official's duty under *in loco parentis* may be assessed by measuring the official's actual conduct against the actions that a reasonable school official, under similar circumstances, might take to protect a student from

²⁶⁹ *Id.*

²⁷⁰ See *Hurlburt v. Noxon*, 565 N.W.S.2d 683, 685 (Supp. Ct. 1990); see also *Norman v. Turkey Run Community Sch. Corp.*, 411 N.E.2d 614, 616 (Ind. 1980); *Griego v. Hogan*, 71 N.M. 280, 377 P.2d 953, 955 (1963).

²⁷¹ Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 823 (Summer 1992).

²⁷² See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

²⁷³ Beci, *supra* note 271, at 824.

injury.²⁷⁴ In *New Jersey v. T.L.O.*,²⁷⁵ the Court rejected use of the *in loco parentis* doctrine as related to a governmental search, holding that school officials are state actors for purposes of constitutional guarantees of freedom of expression and due process.

For purposes of Florida community colleges, one might argue that the *in loco parentis* doctrine could apply where minors are involved in institutional programs ranging from dual enrollment classes²⁷⁶ to continuing education summer youth programs.²⁷⁷ Also, some community college credit students are enrolled prior to reaching majority.²⁷⁸ Generally, however, given the fact that less than two percent of the nation's college population is under age

²⁷⁴ See *Ferraro v. Board of Educ.*, 212 N.Y.S.2d 615, 626 (App. Term.), *Aff'd*, 221 N.Y.S.2d 279 (App. Div. 1961); *Quigley v. School Dist.*, 446 P.2d 177 (Or. 1968); *Cherney v. Employers Mut. Liab. Ins. Co.*, 289 N.W.2d 372 (Wis. Ct. App. 1979); see also *Thompson v. Ange*, 443 N.Y.S.2d 918 (App. Div. 1981).

²⁷⁵ *T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). For a different perspective on the *in loco parentis* doctrine, see *Mercer v. State*, 450 S.W.2d 715 (Tx. Civ. App. 1970). In *Mercer*, the court held that a search conducted by a high school principal was not, in effect, a governmental search because the school official was acting in *in loco parentis*. Because a parent would not be exercising a government power, the court reasoned, neither did the principal acting in the parents' place.

²⁷⁶ FLA. STAT. § 240.1163 (1993).

²⁷⁷ FLA. STAT. § 240.301(2)(c) (1993).

²⁷⁸ The term "majority" is defined in the AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION, as "the status of legal age when full civil and personal rights may be exercised legally."

eighteen, *in loco parentis* may have limited applicability at the college level.²⁷⁹

Invasion of Privacy

The United States Constitution does not expressly provide for a right to privacy; however, the Supreme Court has held that the Bill of Rights is a penumbra from which the right of privacy is implied.²⁸⁰ Plaintiffs have commonly employed invasion of privacy as a tort theory to challenge drug testing programs.²⁸¹ It has been argued that, as a matter of public policy, constitutional privacy safeguards should be applied to the private sector. Also, plaintiffs have argued their cases on the basis that drug testing is a violation of the Restatement (Second) of Torts, Sections 652(A) and 652(D). Section 652(A) provides that one who invades the privacy of another is subject to liability for the resulting harm to the interests of the other. The right to privacy can be invaded by (1) unreasonable intrusion upon

²⁷⁹ WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 2ND ED. § 10.11 (West Publishing Co.) (1987); see also Moore v. Student Affairs Committee of Troy State University, 284 F.Supp. 725 (M.D.Ala. 1968).

²⁸⁰ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁸¹ See *Dotson v. McLaughlin*, 216 Kan. 201, 207-208, 531 P.2d 1 (1975); see also *Industrial Foundation of the South v. Texas Industries*, 540 S.W.2d 668, 679 (1976); *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 336 (1924); *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166 (1976); *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977); *Carlisle v. Fawcett Publications*, 201 Cal.App.2d 733, 20 Cal.Rptr. 405 (1962); *Ford Motor v. Williams*, 108 Ga.App. 21, 132 S.E.2d 206 (1963).

the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and/or (4) publicity that unreasonably places the other in a false light before the public.²⁸²

Section 652(D) provides that one who gives publicity to a matter concerning the private life of another can be subject to liability to the other for invasion of privacy, if the matter publicized is of the kind that would be highly offensive to a reasonable person;²⁸³ and/or is not of legitimate public concern.²⁸⁴

These four separate torts may be restated thusly:

- (1) Intrusion into private affairs, which may consist of an unreasonable intrusion into an individual's physical solitude, seclusion, or private affairs. Three elements make up this tort: (a) a prying or intrusion; (b) which is objectionable or offensive to a reasonable person; and (c) into a place or into affairs which are private and entitled to be private.²⁸⁵

²⁸² RESTATEMENT (SECOND) OF TORTS, *supra* note 202, at § 652.

²⁸³ *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970).

²⁸⁴ RESTATEMENT (SECOND) OF TORTS, *supra* note 202, at § 652.

²⁸⁵ RESTATEMENT (SECOND) OF TORTS, *supra* note 202, at § 652D; see also David A. Cathcart, *Drug and Alcohol Policies and Testing Programs - A Review of Significant Issues*, C588 A.B.A.J. 323 (1991).

- (2) Public disclosure of private facts, which consists of four elements: (a) public disclosure; (b) of a private fact; (c) which would be offensive or objectionable to a reasonable person; and (d) which is not of legitimate public concern.²⁸⁶
- (3) False light, which is similar to defamation, the difference being false light concerns injured feelings rather than injured reputation. False light is comprised of three elements: (a) publicity; (b) which places a person in a false light in the public eye; and (c) which would be objectionable to a reasonable person.²⁸⁷
- (4) Exploitation of a name or picture, which occurs when an individual's photograph or name is used without consent for commercial purposes.²⁸⁸

Those who have argued their cases on the basis of the Restatement (Second) of Torts theories have met with little success.²⁸⁹ As stated in *Groves v. Goodyear Tire & Rubber Co.*:²⁹⁰

The courts appear to be supportive of an employer's attempts to create a safe work-

²⁸⁶ Cathcart, *supra* note 285, at 324; see also *Bratt v. IBM*, 785 F.2d 352 (1st Cir. 1986).

²⁸⁷ Cathcart, *supra* note 285, at 324.

²⁸⁸ *Id.*

²⁸⁹ Stanley, *supra* note 5, at 14.

²⁹⁰ *Groves v. Goodyear Tire & Rubber Co.*, 1991 Ohio App. LEXUS 792, at 11.

ing environment by holding that drug testing does not constitute an invasion of the employees' common law right to privacy.²⁹¹

As for the argument that, as a matter of public policy, constitutional safeguards against invasion of privacy should be extended to the private sector, the case of *Hennessey v. Coastal Eagle Point Oil Company*²⁹² refutes that notion. The plaintiff in *Hennessey* argued that his employer's drug testing program violated both the United States and New Jersey constitutions' prohibitions against unreasonable searches.²⁹³ The court, however, found that

the state and federal safeguards against unreasonable searches and seizures do not constitute a clear mandate of public policy . . . in a private employment context and that privacy, though an important value of our society, is too amorphous a standard to qualify . . . as a clear mandate of public policy.²⁹⁴

Whether drug testing represents an unreasonable invasion of privacy is a matter of debate. Some would argue that urinalysis is a "severe privacy intrusion."²⁹⁵ Others, such as Judge Richard A. Posner of the 7th U.S. Circuit Court of Appeals contend that "random drug testing is at

²⁹¹ *Id.*

²⁹² *Hennessey v. Coastal Eagle Point Oil Co.*, 589 A.2d 170 (N.J. Super. A.D. 1991).

²⁹³ *Id.* at 175.

²⁹⁴ *Hennessey*, 589 A.2d at 175.

²⁹⁵ See *Caruso v. Ward*, 72 N.Y.2d 432, 438, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988); see also *Patchogue*, 70 N.Y.2d, at 66.

once an important deterrent to the use of illicit drugs and a relatively minor invasion of privacy."²⁹⁶

How much privacy an employee should expect has some relevance to the extent to which the Fourth Amendment offers protection against unreasonable search and seizure actions. Public employees have a lesser privacy expectation than some others in society.²⁹⁷ Consider the majority opinion, written by Judge Joseph W. Bellacosa, in *Seelig v. Ward*:²⁹⁸

Not all government employees enjoy the same level of expectation of privacy . . . Also, the number of categories of particular public employees' groups is not alone dispositive. Rather, the identification and weighing of all the unique and particular facts of each case govern.²⁹⁹

The reasonable expectations concept became widely employed after the 1967 decision in *Katz v. United States*.³⁰⁰ In *Katz*, the Court held that an individual could have a "reasonable," and, therefore, protectible, expectation of privacy as to tangible things, such as conversations originating from a public telephone booth. Therefore, even an area accessible to the public may be constitutionally protected.³⁰¹ It is important to note in *Katz* that the Court

²⁹⁶ See *Dimeo*, 943 F.2d at 679.

²⁹⁷ *Skinner*, 489 U.S. at 677.

²⁹⁸ See *Campriello*, *supra* note 165, at 1 (col.2).

²⁹⁹ *Id.*

³⁰⁰ *Katz v. U.S.*, 389 U.S. 347 (1967).

³⁰¹ *Id.*, at 351-52.

held that, "what one knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection."³⁰² The Fourth Amendment guarantees only reasonable expectations of privacy and provides a "twofold requirement" that an individual exhibit "an actual subjective expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable."³⁰³

Negligence

Negligence may be the most likely cause of action in an employee challenge of a drug testing policy.³⁰⁴ Typically, an employee who invokes the negligence theory alleges that his or her employer, or the laboratory performing the test, has been negligent. College or university officials who elect to screen employees for drugs may have a duty to conduct the screening in a non-negligent manner.³⁰⁵ The employee could charge that the employer was negligent in selecting the lab that performed the analysis. Another example of a negligence argument could be that the laboratory did not maintain an

³⁰² *Id.*, at 351.

³⁰³ *Id.* at 361; For more recent decisions on reasonable privacy expectations see *Smith v. Maryland*, 442 U.S. 735 (1979); *California v. Greenwood*, 486 U.S. 35 (1988); *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989) *rev'g* 511 So.2d 282 (1987).

³⁰⁴ *Stanley*, *supra* note 5, at 14.

³⁰⁵ *Id.*

adequate chain of custody of the sample³⁰⁶ or that the laboratory erred when performing the test.³⁰⁷ (One of the most common drug tests is the EMIT test,³⁰⁸ which has an error rate as high as 25 percent.)³⁰⁹

A finding for an employee on the basis of negligence can result in severe penalties. In Sedgwick County, Kansas, a jury returned a \$675,000 actual damages verdict against the Roche Biomedical Laboratories in a drug testing case.³¹⁰ The plaintiff was fired after the Roche lab reported a confirmed positive test to his employer. The jury found that the tests were not conducted properly and were invalid. Moreover, the jury concluded that the defendant acted with "willful and wanton conduct" and, therefore, should pay punitive damages.³¹¹ The trial court judge determined the amount of punitive damages and awarded the plaintiff \$3.4

³⁰⁶ *Quinones v. United States*, 492 F.2d 1269 (3d Cir. 1974).

³⁰⁷ *Stanley*, *supra* note 5, at 14; *see also Jones*, 628 F.Supp. 1500.

³⁰⁸ EMIT, *supra* note 244.

³⁰⁹ David A. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 234 (Fall 1986).

³¹⁰ *Dick v. Koch Gathering Systems, Inc., Koch Industries, Inc., and Roche Biomedical Laboratories, Inc.*, 89 C. 1840, 90 C. 1825 (Dist.Ct. Sedgwick Co.) (1991).

³¹¹ *Id.*

million.³¹² The case is believed to be the first instance of a court stating that a laboratory had a duty to handle drug tests properly.³¹³

Under the master-servant doctrine, an employer could be held responsible for the actions of an employee who has tested positive for drug use if that employee injures another person or persons while under the influence of drugs during the course and scope of employment.³¹⁴ A case that was ultimately dismissed by the Washington State Supreme Court, *Chesterman v. Barmon*,³¹⁵ illustrates the contention that an employer could be held liable for actions of an employee who injures a third party. In *Chesterman*, an employee who ingested a hallucinogen at work later sexually assaulted a woman after he broke into her home. The court held that on-the-job drug use would have to be shown to be the legal cause of the injury to a third party in order for the employer to be held liable.³¹⁶ Generally, plaintiffs have not been successful in drug testing cases by employing the

³¹² *Id.*; See also, *Ex-Koch Employee Wins Lawsuit Against Roche Drug Testing Firm*, WICHITA BUS. J., Oct. 4, 1991, at 2.

³¹³ Blum, *supra* note 8, at 1 (col. 1).

³¹⁴ *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983).

³¹⁵ *Chesterman v. Barmon*, 305 Or. 439, 753 P.2d 404 (Sup. Ct. 1988).

³¹⁶ *Id.*

negligence theory,³¹⁷ but Roche demonstrates that the theory is viable.

Probable Cause (Reasonable or Individualized Suspicion)

Some government employees, due to the nature of their jobs, may have a lesser privacy expectation than others.³¹⁸ However, that does not mean the government has carte blanche where drug testing is concerned.³¹⁹ Generally, the government cannot require drug testing of employees in the absence of individualized (or reasonable) suspicion.³²⁰ Reasonable suspicion is a lesser standard than probable cause, which is aimed at the discovery of evidence to be presented at a criminal trial.³²¹ Under the Fourth Amendment, reasonable suspicion must be based on specific, objective criteria and the reasonable inferences drawn from such facts, in light of experience.³²² Reasonable suspicion may entail a combination

³¹⁷ See *Weaver v. Coca-Cola Bottling Co.*, 805 F. Supp. 10 (W.D. Va. 1992); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. Ct. App. 1993).

³¹⁸ *Skinner*, U.S. 489 at 677.

³¹⁹ *Turkula*, *supra* note 184, at 5A-20.

³²⁰ *Id.*; Reasonable suspicion is akin to probable cause, but was established as a lesser standard in *Terry*, 392 U.S. 1, 88 S.Ct. 1868 (1968); see also *City of Palm Bay v. Bauman*, 475 So.2d 1322.

³²¹ See *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S.Ct. 738, 741, 93 L.Ed.2d 739 (1987).

³²² See *Bostic*, 650 F.Supp. at 251; see also *McDonnell v. Hunter*, 612 F.Supp. 1122, 1129 (S.D. Iowa), *aff'd* 746 F.2d 785 (8th Cir. 1984).

of factors, such as information provided by colleagues which may indicate a high probability of truth.³²³ Examples of what might constitute or contribute to reasonable suspicion are an accident involving government property,³²⁴ increased absenteeism and tardiness, excessive unauthorized absences later attributed to emergencies, unusually high occurrences of colds, flu, and headaches, frequent and unexplained disappearances from work cites, increased carelessness and disregard for others' safety, and higher than normal accident rates both on- and off-duty.³²⁵ Other contributing factors may be depression, anxiety, disheveledness, weariness, excessive perspiration, volatility, or unpredictability in mood.³²⁶

While the right of government to test its employees is not absolute, neither is the requirement of probable cause.³²⁷ One exception to the probable cause requirement is an administrative search, which can only be legally conducted given a strong state interest and/or pervasive regulation of the industry which reduces the justifiable

³²³ Smith v. White, 666 F.Supp. 1085 (E.D. Tenn. 1987).

³²⁴ American Federation of Government Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

³²⁵ James Redecker and Jonathan Segal, *How to Protect Employers Who Test for Drugs and Alcohol Abuse*, 33 PRAC. LAW. 13 (1987).

³²⁶ *Id.*

³²⁷ Turkula, *supra* note 184, at 5A-21.

expectation of privacy of the employee to be tested.³²⁸ This exception has been held valid for horse racing jockeys³²⁹ and nuclear power plant employees.³³⁰

A case that defined the reasonable suspicion standard in the school setting is *New Jersey v. T.L.O.*,³³¹ with which the Supreme Court began to employ a "reasonable under all circumstances" test in non-criminal search and seizure cases.³³² *T.L.O.* marked the first case in which the Supreme Court examined the responsibilities of school officials under the Fourth Amendment.³³³ The plaintiff was a 14-year-old female student at Piscataway (New Jersey) High School whose purse was searched for cigarettes by an assistant principal. The principal had reasonable suspicion that the student had been smoking in the restroom in violation of school rules. In searching her purse without consent, the principal discovered rolling papers, names of students and purchase amounts, and marijuana. The court found that

³²⁸ *Shoemaker*, 795 F.2d at 1142.

³²⁹ *Id.* at 1143.

³³⁰ *Smith*, 666 F.Supp 1085.

³³¹ *T.L.O.*, 469 U.S. 325, 105 S.Ct. 733.

³³² *Id.*; For additional perspectives on the reasonable suspicion doctrine in an educational context, *see also* *Bellnier v. Land*, 438 F. Supp. 47 (N.D.N.Y. 1977); *Kuehn v. Renton School Dist.* No. 403, 694 P.2d 1078 (Wash. 1985); *Martens v. District No. 220*, 620 F. Supp. 29 (N.D. Ill. 1985); *Cales v. Howell Public Schools*, 635 F. Supp. 454 (E.D. Mich. 1985).

³³³ STEPHEN B. THOMAS, *HEALTH RELATED LEGAL ISSUES IN EDUCATION*, 42-43, (Nat'l Org. on Legal Probs. of Educ.) (1990).

warrants and probable cause do not apply in public schools because of the "substantial interest of teachers and administrators in maintaining discipline on school grounds."³³⁴ The court held that the administrator has a "special need" to respond immediately to "behavior that threatens either the safety of school children and teachers or the educational process itself."³³⁵

Public Safety

The random testing of employees in safety-sensitive positions³³⁶ has been allowed as an exception to the probable cause/warrant requirements of the Fourth Amendment.³³⁷ Random selection must be uniform and systematic and not arbitrary nor discriminatory.³³⁸ In both the seminal Supreme Court cases on employee drug testing, *Skinner* and *Von Raab*, the doctrine of public safety is addressed. In *Skinner*, the Court recognized the government's interest in protecting the safety of the traveling public and employees, and in *Von Raab*, the physical safety of Custom Service employees was acknowledged as a legitimate interest. Nevertheless, the

³³⁴ *Katz*, 389 U.S. 347.

³³⁵ *Id.*

³³⁶ *American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987).

³³⁷ *See Thompson v. Marsh*, 884 F.2d 113 (4th Cir. 1989); *National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056, 1990; *Skinner*, 489 U.S. at 602.

³³⁸ *McDonnell*, 612 F.Supp. at 1129.

concept of a safety-sensitive position has been a somewhat nebulous one, as such jobs as policemen,³³⁹ firefighters,³⁴⁰ prison employees,³⁴¹ court clerks,³⁴² mass public transportation workers,³⁴³ and school bus attendants³⁴⁴ have been held by some courts to be non-safety-sensitive in nature. Conversely, a court held that a "gofer" (errand boy) working in a nuclear plant was properly included in an employer's drug testing program.³⁴⁵

In another case involving a nuclear plant, *International Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm'n*,³⁴⁶ the Ninth Circuit ruled on the constitutionality of a random drug testing program. The union contended that the program was unconstitutional because it applied to workers who performed jobs that could not threaten public safety.³⁴⁷ The court found, however, that

³³⁹ *Policeman's Benevolent Ass'n. of N.J. v. Township of Washington*, 672 F. Supp. 779 (D.N.J. 1987).

³⁴⁰ *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

³⁴¹ *McDonnell*, 612 F.Supp. at 1129.

³⁴² *Bostic*, 650 F.Supp. at 251.

³⁴³ *Amalgamated Transit Union, Local 1277, AFL-CIO v. Sunshine Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987).

³⁴⁴ *Jones*, 628 F.Supp. 1500.

³⁴⁵ *Ensor v. Rust Eng'g. Co.*, 704 F. Supp. 808, 811 (N.D. Tenn. 1989.).

³⁴⁶ *Int'l Bhd of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Commission*, 966 F.2d 521 (9th Cir. 1992).

³⁴⁷ *Id.* at 527.

the union failed to establish that assertion and upheld the Nuclear Regulatory Commission's refusal to exempt the employees from testing.³⁴⁸ The court held that if the union had been "able to establish that clerical workers did not engage in safety-sensitive work and had no access to the plant's vital areas, the balance of interests might be different."³⁴⁹ The court considered only what impact workers might have on public safety, not the potential harm to the workers themselves.

In a similar case, *American Federation of Government Employees v. Sullivan*,³⁵⁰ the District Court for the District of Columbia ruled on the constitutionality of a random drug testing program for government motor vehicle operators who did not carry passengers. The court used the *Skinner* and *Von Raab* balancing test, weighing the government's interest in conducting the test against the individual's privacy expectations,³⁵¹ and found that because the government drivers did not carry passengers nor had access to classified information, that neither the passenger safety rationale nor national security concerns were applicable.³⁵²

³⁴⁸ *Id.* at 526-27.

³⁴⁹ *Id.*

³⁵⁰ *American Federation of Gov't Employees v. Sullivan*, 787 F. Supp. 255 (D.D.C. 1992).

³⁵¹ *Id.* at 257.

³⁵² *Id.*

The court held that the program was unconstitutional, stating that

the government's interest here is the safety risk that an impaired government driver might pose to other drivers on the road. While not insubstantial, this is obviously no different than the interest the public and the government have in keeping potentially impaired drivers off the road. If this is a sufficient 'special government need' to permit warrantless searches..., then the federal government could proceed to test any and all drivers on the road.³⁵³

In *International Brotherhood of Teamsters v. Department of Transportation*,³⁵⁴ the Ninth Circuit held that the Federal Highway Administration's regulations authorizing random, biennial, pre-employment, and post-accident drug testing of motor carrier employees were reasonable under the Fourth Amendment. The court ruled that the government's compelling interest in the safety of the nation's highways outweighed the minimal intrusion on the drivers' privacy.³⁵⁵ The argument has been made that the court erred by analyzing the reasonableness of each type of drug testing mandated by the program, rather than weighing the reasonableness of the program as a whole.³⁵⁶

³⁵³ *Id.*

³⁵⁴ *Int'l Brotherhood of Teamsters v. Dept. of Transportation*, 932 F.2d 1292 (9th Cir. 1991).

³⁵⁵ *Id.* at 1305-08.

³⁵⁶ See *Moresi*, *supra* note 168, at 1040.

The case of *Jones v. McKenzie*³⁵⁷ offers some definition as to what constitutes a public school employee in a safety-sensitive position. Jones worked as a school bus attendant, primarily responsible for the safe loading and unloading of handicapped children. He was terminated following a single unconfirmed positive urinalysis test. Across-the-board drug testing was required of all transportation employees in the school district due to a major increase in traffic accidents, absenteeism, several incidents of abnormal, erratic behavior by employees, and the discovery of syringes and bloody needles in restrooms frequented by employees.

The plaintiff tested positive for marijuana. The test was repeated manually but not confirmed by a second method or test, although such was recommended by the manufacturer. After being informed of the positive result, the employee submitted to two additional urinalysis tests, both of which produced negative results. The school district elected to fire the employee despite the second tests.

The employee sued, and the court found that the urinalysis test, as conducted, constituted an unreasonable search action. In balancing the interests of the school district against those of the employee, the court held that the employee was an attendant, and unlike a bus driver, was not directly responsible for children's safety. Moreover, the court held that the plaintiff was not personally

³⁵⁷ *Jones*, 628 F.Supp. 1500.

suspected of using drugs. Therefore, the school district had a weakened position in terms of establishing that the search was not a Fourth Amendment violation.³⁵⁸ The court in dicta proposed that had reasonable suspicion existed and had the search otherwise been conducted legally that the attendant may have been given a temporary reassignment or suspended pending confirmation of a positive drug test.³⁵⁹

Religious Freedom

The First Amendment's freedom of religion clause³⁶⁰ has been used to challenge an employee drug testing program in at least one case, *Rushton v. Nebraska Public Power District*.³⁶¹ In *Rushton*, two nuclear power plant employees, Warren Rushton and David Lostroh, challenged the constitutionality of the employer's random drug screening program. The United States District Court for the District of Nebraska upheld the constitutionality of the program, and the employees appealed to the United States Court of Appeals, Eighth Circuit. The court held that the program did not violate the employees' right to free exercise of religion nor their right to be protected from unreasonable

³⁵⁸ *Id.*

³⁵⁹ Thomas, *supra* note 333, at 49.

³⁶⁰ U.S. CONST. amend. I; provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

³⁶¹ *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (1988).

search and seizure actions.³⁶² The court called the appellants' first argument "a novel one."³⁶³ The employees did not object to urinalysis per se, but rather to a statement of policy in the program that "alcoholism is recognized as an illness for which there is effective treatment and rehabilitation."³⁶⁴ The appellants, conservative Christians, argued that alcoholism is a sin, not an illness. Further, they said they were obliged to separate themselves from heretical doctrines, such as the notion that alcoholism is a disease. By complying with the drug testing program, the appellants argued, they would be giving tacit approval to a heretical idea. Thus, they contended they should be exempt from testing to preserve their right of free exercise.

While the court recognized the plaintiff's beliefs as sincere, it declined to comment as to whether the drug testing program placed a burden on the plaintiff's religious practices because "the burden, if any, was amply justified under prevailing legal principles."³⁶⁵ Thus, the court ruled that the government (in the form of a public employer) had overriding interests in ensuring (1) the health and safety of the public and Nebraska Public Power District employees

³⁶² *Id.*

³⁶³ *Id.*, at 564.

³⁶⁴ *Id.*

³⁶⁵ *Id.*, at 564.

and (2) the economic interest of the ratepayers. The appellants agreed the government had compelling interests, but further claimed that they were not in positions requiring snap decisions or quick reflexes, and that the plant had sufficient backup safety systems to protect against accidents. Therefore, they should still be exempt from the drug testing program. The court disagreed, holding that the aforementioned backup systems did not make "superfluous the addition of new measures to make the plant even safer."³⁶⁶

Search and Seizure

It is well established that urinalysis constitutes a search and seizure action.³⁶⁷ The reasonableness of a search "depends on all of the circumstances surrounding the search . . . and the nature of the search."³⁶⁸ The Supreme Court has defined reasonableness under the Fourth Amendment as

not capable of precise definition
or mechanical application. In each
case, it requires a balancing of the
need for the particular search against

³⁶⁶ *Id.*, at 565.

³⁶⁷ See *Amalgamated Transit Union, Local 1277, AFL-CIO v. Sunshine Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987); *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Capua*, 643 F. Supp. 1507; *Jones v. McKenzie*, 628 F.Supp. 1500; *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D.Ga. 1985); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1298-99 (9th Cir. 1991); see also *Wayne Lafave*, *supra* note 279.

³⁶⁸ *Skinner*, 489 U.S. at 619; see also *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308 (1985).

the invasion of personal rights the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.³⁶⁹

It has been traditionally mandated by society that the act of urination be private and to require otherwise constitutes unreasonableness.³⁷⁰ The courts have held that the interference caused by urinalysis to a person's privacy expectations and bodily integrity are analogous to interference caused by blood testing, which has also been ruled a search and seizure action.³⁷¹ As previously discussed, the courts have found that when a special need exists, so do exceptions to the Fourth Amendment requirements of a warrant and probable cause.³⁷² However, irrespective of the need for a warrant, "some quantum of individualized suspicion"³⁷³ is generally required before a search is deemed reasonable. The exception to this requirement exists when the privacy interests implicated by the search are minimal, and requiring individualized

³⁶⁹ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

³⁷⁰ See *McDonnell*, 612 F.Supp. at 1129; *Lovvorn*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua*, 643 F. Supp. 1507.

³⁷¹ See *Schmerber v. California*, 384 U.S. 757 (1966); *McDonnell*, 612 F.Supp. at 1129; *Amalgamated Transit Union, Local 1217, AFL-CIO v. Sunshine Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987).

³⁷² See *T.L.O.*, 469 U.S. 325, 105 S.Ct. 733.

³⁷³ *Skinner*, 489 U.S. at 624.

suspicion jeopardizes the government's interests.³⁷⁴ For a public employee to prevail in a drug testing case, he or she must establish (1) a legitimate expectation of privacy and (2) that the expectation is one that society is prepared to recognize as reasonable.³⁷⁵

Self-Incrimination

An employee may assert that drug testing violates the Fifth Amendment to the U.S. Constitution's proscription against self-incrimination.³⁷⁶ The amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."³⁷⁷ However, employees have not prevailed under the self-incrimination theory, as a urine sample is considered no more testimonial in nature than other physical evidence, e.g., handwriting examples, blood tests, voice samples, outside the scope of the Fifth Amendment.³⁷⁸ Urinalysis has also been held outside the scope of the Fifth Amendment.³⁷⁹ Circumstances involving contact with illicit drugs and medications ingested is private

³⁷⁴ *Id.*; see also *Capua*, 643 F. Supp. 1507; *Lovvorn*, 647 F. Supp. 875.

³⁷⁵ *Katz*, 389 U.S. at 361.

³⁷⁶ See, e.g. *Von Raab*, 489 U.S. 656, *aff'd* in part; *Mack v. U.S.*, 814 F.2d 120 (2d Cir. 1987); see also *Turkula*, *supra* note 184, at 5A-25.

³⁷⁷ U.S. CONST., amend. V.

³⁷⁸ See *Von Raab*, 109 S.Ct. at 1281.

³⁷⁹ *Id.*

information.³⁸⁰ The Fifth Amendment protects incriminating information, not private information.³⁸¹

State Action

Originally the Fourth Amendment was thought only to protect citizens from actions of the federal government. However, in 1961 the Supreme Court ruled in *Mapp v. Ohio*³⁸² that the protection of the Fourth Amendment extends to state action through the Fourteenth Amendment. A discussion of the state action doctrine as related to Florida community college employees appears in the "Florida Community College Employees as State Actors" section of this chapter.

Wrongful Discharge

Emerging case law supports, to some degree, the theory that a privacy infringement is actionable in tort as a wrongful discharge.³⁸³ In the past, the employment-at-will doctrine has been dominant in the workplace, enabling employers to dismiss employees for any reason.³⁸⁴ The at-will doctrine, however, has changed as exceptions have been made

³⁸⁰ Turkula, *supra* note 184, at 5A-25.

³⁸¹ *Id.*

³⁸² 367 U.S. 643 (1961); *see also* *Denver Welfare Rights Organization v. Public Utilities Comm.*, 547 P.2d 239, 243 (1976); *Ouzts v. Maryland Nat. Ins. Co.*, 505 F.2d 547, 549 (1974).

³⁸³ Cathcart, *supra* note 285, at 320.

³⁸⁴ Turkula, *supra* note 184, at 4-6.

for wrongful discharge.³⁸⁵ A wrongful discharge claim can be based on one of three theories: implied contract, implied covenant, or public policy.³⁸⁶ When an employer breaches an implied-in-fact contract, e.g. personnel policies, employee handbooks, oral promises, a valid claim of wrongful discharge can arise. The fact that an employee continues working after such promises are made or materials are issued is sufficient to establish consideration in reliance on employment.³⁸⁷ Employers formulating drug testing policies must be mindful of the implied contract theory, witness *Sutton v. Olympia Forest Product Co.*,³⁸⁸ in which a company's employee handbook indicating employees would not be terminated on the basis of a positive drug test was replaced by a new handbook that stated an opposite position. The court held that the new handbook did not void the implied contract in the original handbook.

A terminated employee may recover for wrongful discharge under the implied covenant theory when the

³⁸⁵ *Id.*

³⁸⁶ *Id.*; see also *Morris v. Hartford Courant Co.*, 513 A.2d 66, 68 (1986); *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (1985); *Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980).

³⁸⁷ See *Pine River St. Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983).

³⁸⁸ *Sutton v. Olympia Forest Products Co.*, No. 86-2-01582-2 (Wash. Super. Ct. 1987); for other drug testing cases involving the implied contract theory, see, *Qualls v. Hickory Springs Mfg. Co.*, 994 F.2d 505 (8th Cir. 1993); *Oliver-Coogler v. Toledo Edison Co.*, 82 Ohio App. 3d 120, 611 N.E.2d 474 (1992).

employer has violated his or her "implied covenant of good faith and fair dealing."³⁸⁹ *Greco v. Halliburton Co.*,³⁹⁰ is a case in which the plaintiff alleged the employer had violated an implied covenant of good faith and fair dealing through the administration of its drug testing program. The plaintiff was terminated for failure to submit to a drug test and acknowledged being aware that refusal was grounds for dismissal. The court found for the defendant, holding that the employer had a "valid purpose" in implementing the drug testing program because of a "legitimate concern about the safety of its employees and the public."³⁹¹ Despite the ruling in *Greco*, the vagueness of the terms "good faith" and "fair dealing" should suggest how easily the implied covenant theory might be employed by a plaintiff in a drug testing case.³⁹²

Courts have also recognized the public policy theory, holding that there is a public policy concern implicit in an individual's right to privacy and that any agreement which intrudes upon that right is illegal and, therefore, unenforceable.³⁹³ The Alaska Supreme Court in *Luedtke v.*

³⁸⁹ *Turkula*, *supra* note 184, at 4-6.

³⁹⁰ *Greco v. Halliburton*, 674 F. Supp. 1147 (D.Wy. 1987).

³⁹¹ *Id.* at 1450.

³⁹² *Turkula*, *supra* note 184, at 4-7.

³⁹³ *Semore v. Pool*, 217 Cal. App. 3d 1087, 266 Cal.Rptr. 280 (1990).

Nabors Alaska Drilling³⁹⁴ held that public policy supports employee privacy and may form the basis of a wrongful discharge action. However, the California Court of Appeal, Fourth District, in *Luck v. Southern Pacific Transportation Co.*,³⁹⁵ held that a violation of California constitutional protections of privacy does not support a cause of action for wrongful discharge in violation of public policy. The *Luck* court noted that the right to privacy, by its very name, is private, not public.³⁹⁶ The court also found that "the issue of whether urinalysis and privacy rights involve public policy interests is one about which reasonable people may, and do, differ" and that "the public policy must be one that was firmly established at the time of termination."³⁹⁷ At the time of the plaintiff's discharge, the constitutional privacy provision had not been interpreted as prohibiting drug testing.³⁹⁸

A 1992 Third Circuit decision represented a dramatic departure from traditional Pennsylvania common law regarding the right of an employer to discharge an at-will employee.³⁹⁹

³⁹⁴ *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123 (1989).

³⁹⁵ *Luck*, 111 S.Ct. at 344.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 329.

³⁹⁸ Cathcart, *supra* note 285, at 316.

³⁹⁹ Peter A. Muhic, *Labor Law - Drug Testing and the Employment At-Will Doctrine: Third Circuit Defines New Cause of Action for Wrongful Discharge*, 66 TEMPLE U. L. REV. 327-28 (Spring 1993).

In *Borse v. Piece Goods Shop, Inc.*,⁴⁰⁰ the court held that an at-will employee discharged for refusing to consent to random drug testing and personal property searches may have a cause for action for wrongful discharge if such testing tortuously invaded her common law right to privacy.⁴⁰¹ This ruling diminished the control a Pennsylvania employer has over the workplace, opening the door for all manner of employee complaints based on the public policy exception.⁴⁰² Prior to *Borse*, Pennsylvania courts had never permitted such a loosely defined common law interest to stand as a "clear mandate" of public policy, limiting an employer's discharge powers.⁴⁰³

The plaintiff had worked for fifteen years at the piece goods shop.⁴⁰⁴ In January 1990, the shop adopted a substance abuse policy that required employees to submit to random urinalysis screening for drug use, and/or personal searches of belongings on company property.⁴⁰⁵ The plaintiff declined to consent, citing that her constitutional rights to privacy and freedom from unreasonable search and seizure actions

⁴⁰⁰ *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992).

⁴⁰¹ *Id.* at 613.

⁴⁰² *Muhic*, *supra* note 399, at 327.

⁴⁰³ *Id.*

⁴⁰⁴ *Borse*, 963 F.2d at 613.

⁴⁰⁵ *Id.*

were violated.⁴⁰⁶ The plaintiff was ultimately terminated for failure to consent after repeated warnings. The plaintiff filed suit, but the Eastern District Court of Pennsylvania rejected her claim on the basis of the state's "extremely narrow or non-existent" public policy exception.⁴⁰⁷ The plaintiff appealed to the United States Court of Appeals for the Third Circuit, which recognized the plaintiff's claim of a tortuous invasion of privacy as a public policy exception to the employer's right to discharge.⁴⁰⁸

Specifically, the *Borse* court cited two ways that urinalysis might invade an employee's privacy. First, the court said that the particular manner in which the test is conducted, i.e., monitors being present when the urine sample is given, might constitute a tortuous invasion of privacy.⁴⁰⁹ Second, the court reasoned that a variety of medical conditions, such as diabetes or epilepsy, might be discovered through separate tests of urine.⁴¹⁰ The Third Circuit's decision in *Borse* contrasted its decision in another drug testing case, *Hennessey v. Coastal Eagle Point Oil Co.*,⁴¹¹ in which the court found that monitors standing

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 613.

⁴⁰⁹ *Id.* at 621.

⁴¹⁰ *Id.*

⁴¹¹ *Hennessey*, 589 A.2d 170.

behind employees during the collection of a urine sample would not constitute a "highly offensive action to a reasonable person."⁴¹² The monitors in *Hennessey* were instructed not to look at the "private parts" of employees, but they were nevertheless able to oversee and overhear the private activities of the employees.⁴¹³

Florida Laws Associated with Drug Testing

Several states have legislated on the issue of drug testing by private employers.⁴¹⁴ Those state laws might be best characterized as a "hodgepodge."⁴¹⁵ Florida's regulations are among the most comprehensive in the nation.⁴¹⁶ Those regulations can be found in the Florida Drug-Free Workplace Act⁴¹⁷ (See Appendix E for §122.0455) and the "Drug-Free Workplace Program Requirements."⁴¹⁸ (See Appendix F for §440.101; §440.102; §287.087.) These statutes are similar in most of their provisions but contrasting in

⁴¹² *Id.* at 173.

⁴¹³ *Id.*

⁴¹⁴ Philip E. Berlin, *More State Laws Now Regulate Drug Testing in the Workplace*, 13 NAT'L L. J. 19 (col. 3) (July 8, 1991).

⁴¹⁵ In Blum, *supra* note 8, at 1 (col. 1), Rodney Smolia, director of the Institute of Bill Of Rights Law at the College of William & Mary-Marshall Whyte School of Law, employed the characterization of "hodgepodge."

⁴¹⁶ Turkula, *supra* note 184, at 5-7.

⁴¹⁷ FLA. STAT. Ann. § 112.0455 (1993).

⁴¹⁸ FLA. STAT. tit. XXXI, ch. 440, sec. 440.102 (1993).

requirements for testing governmental and private employees.⁴¹⁹ Commonalities in the Florida Drug-Free Workplace Act and the "Drug-Free Workplace Program Requirements" include

- (1) a requirement of written notice of a drug testing policy prior to implementation of testing.
- (2) provisions for and regulation of four principle types of testing; job applicant testing, reasonable suspicion testing, routine fitness for duty testing, and follow-up testing for up to two years after completion of a rehabilitation program.⁴²⁰
- (3) prohibition of any action taken against any employee following a positive drug screening test, but prior to a confirmation test. Also, prohibitions regarding the discharge, discipline or discrimination against an employee solely upon the employee's voluntarily seeking treatment while under the employ of the employer for a drug-related problem (a) if the employee has not previously tested positive for drug use; (b) entered an employment assistance program for drug-related problems; or (c) entered an alcohol and drug rehabilitation program.⁴²¹

⁴¹⁹ *Id.*

⁴²⁰ FLA. STAT. § 440.102(4) (1993).

⁴²¹ Turkula, *supra* note 184, at 5-7, 5.70.

The Florida Drug-Free Workplace Act authorizes the Department of Health and Rehabilitation Services to formulate rules for the state drug testing program which state and private employers must follow. Anyone who manipulates a urine sample is subject to being charged with a misdemeanor under Florida state law.⁴²² Florida employees must be provided with an opportunity to read the employer's testing policy.⁴²³ Also, Florida Statutes require that detailed notice be given to applicants and employees before any drug testing is conducted. Employees must be given a written policy statement from the employer that contains the following:

- (1) a general statement of the employer's policy on employee drug use and a general statement on confidentiality;
- (2) a reference to the statutory authority for the drug test;
- (3) a list of procedures for employees and job applicants to report the use of prescription or non-prescription medications confidentially both before and after being tested;
- (4) a statement of the consequences of refusing to submit to a test;

⁴²² FLA. STAT. § 17.565 (1993).

⁴²³ FLA. STAT. tit. XXXI, ch. 440, § 440.102 et seq. (1993).

- (5) the names, addresses and telephone numbers of employee assistance programs and local rehabilitation programs;
- (6) a statement that an employee or job applicant who receives a positive, confirmed drug test may contest or explain the result to the employer within five working days after written notification of the positive result;
- (7) a statement informing the job applicant or employee of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to the statute;
- (8) a list of drugs for which the employer will test, described by brand names or common names as applicable, as well as by chemical names;
- (9) a statement regarding any applicable collective bargaining agreement; and
- (10) a statement notifying employees and job applicants of their right to consult a testing laboratory for technical information regarding prescription and non-prescription medication.⁴²⁴

Florida law specifically permits "reasonable suspicion drug testing,"⁴²⁵ based on the following articulated facts and inferences:

⁴²⁴ *Id.*

⁴²⁵ FLA. STAT. § 440.09(7)(a) (1993).

- (1) observable phenomenon in the workplace, such as direct observation of drug use or of physical symptoms or manifestations indicating that the employee is under the influence of a drug;
- (2) abnormal conduct or erratic behavior while at work, or a significant deterioration in work performance;
- (3) a report of drug use, provided by a reliable and credible source, that has been independently corroborated;
- (4) evidence that the employee has tampered with a drug test during his or her employment with the current employer;
- (5) information that the employee has caused or contributed to an accident while at work;
- (6) evidence that the employee has used, possessed, sold, solicited or transferred drugs while working, while on the employer's premises or while operating the employer's vehicle, machinery or equipment.⁴²⁶

In the case of an injury on the job that the employer suspects was the result of drug use, the statutes provide that

if an employer has reason to suspect
that the injury was occasioned primarily
by the intoxication of the employee or

⁴²⁶ FLA. STAT. tit. XXXI, ch. 440, § 440.102 et seq. (1993).

by the use of any drug which affected the employee to the extent that the employee's normal faculties were impaired, the employer may require the employee to submit to a drug or alcohol test.⁴²⁷

A more comprehensive statute provides, "If an employer implements a drug-free workplace program which includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the division, the employer may require the employee to submit to a test for the presence of drugs or alcohol."⁴²⁸ If reasonable suspicion drug testing is conducted, a Florida employer must detail promptly and in writing the circumstances that form the basis of the determination that reasonable suspicion existed. A copy of this documentation must be provided the employee by the employer upon request. Failure on the part of an employee to take or pass a drug test may result in ineligibility for workers' compensation and unemployment compensation benefits.⁴²⁹ As an example, a Florida Appeals court held that an employee's refusal to submit to a urinalysis test on demand constituted "misconduct" warranting the denial of unemployment compensation benefits to the discharged employee in *Fowler v. Unemployment Appeals Commission*.⁴³⁰

⁴²⁷ FLA. STAT. § 440.09(7)(a) (1993).

⁴²⁸ FLA. STAT. § 440.101 (1993).

⁴²⁹ FLA. STAT. tit. XXXI, ch. 440, § 440.102 et seq. (1993).

⁴³⁰ *Fowler v. Unemployment Appeals Commission*, 537 So.2d 162, 163 (Fla. Dist.Ct.App. 1989).

Because of statutory provisions concerning workers' compensation, drug testing can be an economic consideration for Florida employers. An employer whose substance abuse policy does not include a drug screening component can not qualify for reduced workers' compensation rates.⁴³¹

Florida Drug Testing Cases
and Other Eleventh Circuit Decisions

As Florida's public community colleges develop and revise institutional policies concerning substance abuse, decisions rendered on employee drug testing by state courts and circuit courts will be persuasive.⁴³² Therefore, a review of Florida cases and other cases in the Eleventh Judicial Circuit on drug testing is appropriate. Some of the cases do not specifically involve employee drug testing, but nevertheless may offer valuable perspectives on relevant doctrinal issues.⁴³³

The following review will be presented in chronological order beginning with the 1981 case of State of Florida v.

⁴³¹ FLA. STAT., § 627.0915 (1993).

⁴³² Sid McKenzie, General Counsel for the Division of Community Colleges, State of Florida, "An Update on Important Issues Related to ADA," a speech delivered at the Florida Council of Instructional Affairs conference, Feb. 10, 1994, Orlando, Fla.

⁴³³ This section does not include Georgia Association of Educators v. Harris, 749 F. Supp. 1110 (1990), which was previously discussed in the "Public Schools Cases" section of Chapter II.

Daniel Patrick Rafferty.⁴³⁴ Rafferty was the appellee in a case involving blood and urine tests conducted by an arresting officer subsequent to an automobile accident. The evidence was suppressed by the Circuit Court of Appeals, Broward County. The state appealed, and the District Court of Appeals, Fourth District, reversed, finding that due to the severity of the accident, zero readings yielded by a breathalyzer test and the driver's apparent lack of comprehension, the arresting officer had probable cause to believe that the appellee had been driving under the influence of drugs. Therefore, under such circumstances, testing for drugs was constitutional even without consent or warrant.⁴³⁵

The 1984 case of *State of Florida v. T.L.W.*⁴³⁶ does not involve urinalysis or the testing of an individual, but offers insight on evidentiary issues. Evidence of T.L.W., a child, possessing cocaine was suppressed by the Circuit Court, Lee County. The decision of the Circuit Court was appealed by the state to the District Court of Appeals, Second District. The appellee argued that her Sixth Amendment rights to confrontation of witnesses against her and due process had been violated when the state consumed all of the suspect drugs during testing. The Court of

⁴³⁴ *State of Florida v. Daniel Patrick Rafferty*, 405 So.2d 1004 (1981).

⁴³⁵ *Id.*

⁴³⁶ *State of Florida v. T.L.W.*, 457 So.2d 566 (1984).

Appeals reversed the lower court's ruling, finding that the Sixth Amendment refers to witnesses and does not encompass physical evidence. As to the due process claim, the court agreed that the intentional or negligent destruction of suspect drugs by the state or its agents constitutes a due process violation. However, the court found that where suspect drugs are unavoidably destroyed or consumed during chemical testing by a state chemist, there is no suppression of evidence entailing a due process violation. In *T.L.W.*, the chemist believed use of the entire sample was necessary to obtain valid scientific results.⁴³⁷

In the 1985 case *City of Palm Bay v. Donald J. Bauman*,⁴³⁸ the city was permanently enjoined, absent probable cause, from requiring police officers and firefighters to provide urine specimens at random to determine the presence of controlled substances. The city appealed to the District Court of Appeal of Florida, Fifth District, which held that reasonable suspicion, rather than probable cause, was the proper standard, and that the city could prohibit police officers and firemen from using controlled substances at any time during employment. The court held that probable cause was not required to conduct drug testing, rather, the lesser standard of reasonable suspicion, which mandates that officials point to specific objective facts and rational

⁴³⁷ *Id.*

⁴³⁸ *City of Palm Bay v. Donald J. Bauman*, 475 So.2d 1322 (1985).

inferences that they are entitled to draw from those facts based on their experience.⁴³⁹ The court ruled that the City of Palm Bay drug testing program, as it existed, constituted an unreasonable search and seizure action. Further, the court ruled that urine testing could be performed only as a part of a physical examination required for initial employment, or annually, or at other designated career times. The other exception to the enjoinder was probable cause, to-wit reasonable suspicion, supported by circumstances sufficiently strong to warrant a cautious person to believe that a policeman or fireman had been using drugs on the job.⁴⁴⁰

The 1986 case of *Warner v. Walker*⁴⁴¹ offers insight on the appropriate utilization of evidence gained from drug tests. *Warner* is a child custody case, in which the appellant and a stepfather were tested for illicit drug use as one component of determining their parental fitness. The Circuit Court, Highlands County, erred, according to the Second District Court of Appeal, in the manner in which it utilized the information resulting from the urine tests. The parties consented to urinalysis. However, when the test results were received by the court after the final custody hearing, the results were used to determine not only the

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*, at 1325.

⁴⁴¹ *Melinda Sue Warner v. Robert Elmer Walker*, 500 So.2d 645 (1986).

recent use of drugs by the appellant and her husband, but also to determine if they had perjured themselves while previously testifying at the final hearing. The latter utilization was conducted without giving the appellant or her husband an opportunity to refute the court's conclusion of perjury. The court found that to be an error which had an important bearing on the circuit court judge's decision to change custody.⁴⁴²

Another 1986 case, *American Federation of Government Employees v. Weinberger*,⁴⁴³ speaks to such doctrinal issues as reasonable suspicion and consent. This case, decided by the United States District Court, S.D. Georgia, Savannah Division, involved a claim by police officers and their union against the Department of Defense, challenging periodic and mandatory urinalysis testing of civilian police officers holding critical jobs. The court held that the drug testing program constituted (1) an unreasonable search and seizure action; and (2) consent to drug testing could not be required as a condition of employment and did not constitute a waiver of constitutional rights. The court stated that the drug testing program could not be conducted absent individualized suspicion. Consent to testing, the court stated, had been given under the legitimate fear that jobs

⁴⁴² *Id.*

⁴⁴³ *American Federation of Gov't Employees v. Caspar Weinberger*, 651 F. Supp. 726 (1986).

would be lost if consent forms were not signed. Therefore, consent was not voluntarily given.

The doctrinal issues of public safety (versus right to privacy) and due process are the foci of the 1987 case, *Everett v. Napper*.⁴⁴⁴ The plaintiff, a fireman for the City of Atlanta, was terminated because he refused to submit to urinalysis. The plaintiff, who had been named by a fellow fireman and a confirmed drug dealer as a drug buyer, brought a civil rights action against the city and city officials. Summary judgement was entered for the city and city officials by the United States District Court for the Northern District of Georgia. Upon appeal, the United States Court of Appeals, Eleventh Circuit, held that the order for the appellee to submit to urinalysis did not violate his Fourth Amendment rights. The court recognized the city's compelling interest in having firefighters free from drug use, in light of the allegations against the plaintiff, outweighed the plaintiff's privacy rights. However, the court ruled that the plaintiff's suspension without pay from the date he refused to submit to urinalysis until the date of full pre-termination hearing before the Bureau of Fire Services violated the appellee's procedural due process rights. The court held that deprivation of due process rights occurs when governmental conduct would be unjustified even if the most stringent procedural safeguards were

⁴⁴⁴ *Everett v. Napper*, 833 F.2d 1507 (1987).

followed. Therefore, the court affirmed in part; reversed in part and remanded.⁴⁴⁵

News-Press Publishing Company v. Kaune (1987)⁴⁴⁶

is a public records case, in which the appellant sought to examine the medical records of firefighters of the City of Fort Myers. The Circuit Court for Lee County denied a writ of mandamus to permit inspection of medical reports, which included urinalysis results. As provided by a collective bargaining agreement, firefighters physical examinations included blood and urine testing for drug screening. The agreement provided that the results would be made available only to the fire chief. The physician conducting the tests would retain the actual examination documents and would orally inform the fire chief of certain results only if a firefighter's test showed some physical condition that related to his or her job duties, or if both the urinalysis and subsequent tests proved positive. The agreement further provided that the actual physical results would be given to each employee and could be released to the employee's personal physician, but would not be made part of anyone's record or otherwise made public.

The agreement provided that those who tested positive would be interviewed by their immediate supervisor or assistant chief or both. Outside rehabilitation and

⁴⁴⁵ *Id.*

⁴⁴⁶ News-Press Pub. Co., Inc. v. Kaune, 511 So.2d 1023 (1987).

counseling would be offered to assist in correcting the problem. No discipline would be imposed for the first positive test. Those who tested positive would be tested again in six to twelve months, depending on the type and quantity of substances detected. Those refusing to be tested would be disciplined progressively and ordered to take the test again in thirty days.

The court found that the appellant's demands were "overbroad"⁴⁴⁷ and that the respondent, a physician named Centafont, was not acting on behalf of the City of Fort Myers but for the benefit of his patients. The court concluded that the open records law did not apply to any documents identified as being in the possession of appellee Centafont.⁴⁴⁸

The 1988 case of Fort Lauderdale v. Florida Unemployment Appeals Commission⁴⁴⁹ offers insight on unemployment compensation as it relates to employee drug testing as well as the rules of evidence. The City of Fort Lauderdale appealed an order of the Unemployment Commission affirming the appeals of the referee's decision that Vernon L. Moody was qualified for unemployment compensation benefits.⁴⁵⁰ The Fourth District Court of Appeal affirmed.

⁴⁴⁷ *Id.* at 1025.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Ft. Lauderdale v. Florida Unemployment Appeals Commission*, 536 So.2d 1074 (1988).

⁴⁵⁰ *Id.* at 1075.

Moody was employed by the city as an engineer inspector. In March 1986, Moody's drug use came to the city's attention, and the subject went on sick leave, enrolling in a twenty-eight-day drug treatment program at Humana Hospital. However, Moody was administratively discharged from the program in April 1986 because of a disputed drug test result.⁴⁵¹

Moody was thereafter allowed to return to work under certain conditions specified in a "last chance" agreement, which he signed in May 1986. The agreement made Moody subject to random drug testing and provided that a positive result would constitute his voluntary resignation/termination from employment.⁴⁵² On May 8, 1986, Moody tested positive for cocaine use, and was subsequently notified of his termination.

A claims adjuster determined that Moody was qualified for unemployment compensation benefits. The city filed a notice of appeal, and a hearing was conducted by an appeals referee on April 27, 1987.⁴⁵³ The referee found Moody was qualified for unemployment compensation. The Florida Unemployment Appeals Commission affirmed the referee's decision, finding that there was insufficient evidence that Moody tested positive for cocaine use.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

The Fourth District affirmed as well on the basis that the sole evidence for Moody's testing positive was a lab report prepared by an independent laboratory procured by the city. No one representing the laboratory was called as a witness to establish that the report was a business record of the laboratory, admissible as an exception to the hearsay rule under section 90.803(6) of the Florida Statutes (1987). The court found that the lab report, therefore, constituted hearsay, lacking the reliability of a business record as defined by the statutory rules of evidence. The court further found that although hearsay is admissible in an unemployment compensation case for certain purposes, hearsay alone, which would not be admissible over objection in civil actions, is insufficient to prove a fact at issue.⁴⁵⁴

The U.S. Supreme Court seminal drug testing cases, *Skinner* and *Von Raab* are cited in the 1990 case *Department of Corrections v. Colbert*.⁴⁵⁵ In this case, decided by the Supreme Court of Georgia, the state prison fire chief was terminated for testing positive for marijuana use during a random drug test. The employee filed a petition for administrative review. Following administrative affirmance of the decision to terminate, the Superior Court of Tattnall County entered a judgement determining that the Department

⁴⁵⁴ *Id.*

⁴⁵⁵ *Dept. of Corrections v. Colbert*, 260 Ga. 255, 391 S.E.2d 759 (1990).

of Corrections' drug testing policy was unconstitutionally overbroad. The Department of Corrections appealed.

The Georgia Supreme Court ruled that (1) the state's interest in preventing illegal drug use by state prison employees outweighed employees' rights to privacy, and thus, the department's random drug testing program was not unconstitutionally overbroad; (2) the regulation adopted by the Board of Corrections, providing that efficient and effective direction of management of assigned human resources was the direct responsibility of wardens/superintendents and supervisory personnel at each level, did not give warden of the state prison the authority to require random drug testing of its employees. In regard to the second item, any rule regarding drug testing of employees of prisons operating under the Board of Corrections must be promulgated by the Board rather than the warden of the institution. The court applied the balancing test established in *Skinner* and *Von Raab* in noting that the state has a compelling interest in ensuring that all persons in the employ of the prisons are of uncompromised integrity because of their potential access to prisoners. The court said that the nature of the prison system in tandem with the pervasiveness of drugs in the criminal community demands strict regulation.

Skinner and *Von Raab* are also cited in another 1990 case, *Beattie v. St. Petersburg Beach, et.*⁴⁵⁶ *Beattie* offers particular insight on the doctrinal issue of public safety, as well as the need for an organization desiring to implement an employee drug testing program to demonstrate a history of illicit drug use as a primary rationale for instituting a urinalysis program. In *Beattie*, the plaintiff was employed by the City of St. Petersburg Beach as a firefighter. The plaintiff had also been a member of the Internal Association of Firefighters AFL-CIO since August 1982. In October 1983, the city and the union entered into a collective bargaining agreement providing that the city had the right to "hire, examine, classify, promote, train, transfer, assign, schedule, and retain employees in positions with the city."⁴⁵⁷ The agreement also provided that the city had the right to "establish, implement, and maintain an effective internal security practice."⁴⁵⁸ The agreement required that firefighters submit to annual physical examinations. Since 1974, physical examinations included the taking of urine samples. *Beattie* provided a urine sample every year since 1983, but the samples had never been tested for drugs.

⁴⁵⁶ *Beattie v. St. Petersburg Beach*, 733 F. Supp. 1455 (1990).

⁴⁵⁷ *Id.* at 1456.

⁴⁵⁸ *Id.*

The union contract provided for all employees to have their personal physician render a second opinion on any drug test results. If the second opinion differed from that of the city's physician, then the employee had the right to have a third physician render an opinion on the disputed medical question. The third physician's rendering was final.

In August of 1986, the city decided to incorporate urinalysis into its annual physical examinations to determine whether firefighters used controlled substances. The purpose of the testing program was to provide officials with additional information regarding the fitness of firefighters to perform their job-related duties. A memorandum notified all firefighters in advance of the implementation of the drug testing program, which commenced October 17, 1986. Under the plan, firefighters were required to sign a consent form evidencing their agreement to submit to the tests. Failure to consent resulted in the employee being sent home for the day without pay. A second refusal to submit to the test resulted in immediate dismissal. If the firefighter tested positive, a second test was ordered to verify the results of the first test. A second positive test resulted in the employee being ordered to seek rehabilitation through the Tampa Bay Health Plan. Refusal of treatment resulted in immediate termination.

The plaintiff was scheduled to be examined October 29, 1986. He agreed to the physical examination, but not to the drug test. Defendants admitted they had no probable cause or

reasonable suspicion that the plaintiff had been using illicit drugs on or off duty. The plaintiff was sent home without pay. His test was rescheduled, but he never submitted to drug testing.

The plaintiff argued that the city's drug testing program was unconstitutional, violating the Fourth Amendment's provision that "people be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."⁴⁵⁹ The United States District Court, M.D. Florida, Tampa Division, found that although the city had a legitimate interest in protecting public safety and welfare by ensuring its firefighters were fit to perform their duties, there was no current evidence of drug use nor a history of any accidents that could be attributed to drug use. Therefore, the court ruled that the city's drug testing program violated the Fourth Amendment because it provided, without a sufficient compelling interest, for testing in the absence of individualized suspicion. The court alluded to the *Skinner*⁴⁶⁰ and *Von Raab*⁴⁶¹ decisions, but found those seminal U.S. Supreme Court cases, which require a case-by-case balancing of individual and government interests, distinguishable from *Beattie*.

⁴⁵⁹ U.S. CONST., amend. IV.

⁴⁶⁰ *Skinner*, 109 S.Ct. at 1413.

⁴⁶¹ *Von Raab*, 109 S.Ct. at 1390.

In *Skinner*, the court held, the railroad industry had established a history of drug abuse; whereas, in *Beattie*, there was no history of drug abuse, accidents, fatalities or injuries attributable to firefighters' use of drugs on duty. Also in contrast to *Von Raab*, the court ruled that firefighters are engaged in hazardous work involving public safety, but do not carry firearms, as was the case with customs officials. Firefighters are not required to use deadly force in the regular course of their duties, nor are they involved in the front-line defense of the nation or subject to criminal elements or controlled substances. The court ruled that while the city has a interest in ensuring a firefighter's fitness, the role of a firefighter is not analogous to a customs agent whose job is drug interdiction. The court further found that the city's interest was not jeopardized by a requirement of individualized suspicion. Regular medical examinations and job supervision, the court held, was sufficient to protect the city's interest.⁴⁶²

Whether an employee who tests positive for drugs is eligible for unemployment compensation benefits was at issue in the 1991 case *Ford v. Southeast Atlantic Corporation and Florida Unemployment Appeals Commission*.⁴⁶³ The case was heard by the First District Court of Appeal in November 1991. The appellant applied for unemployment compensation

⁴⁶² *Beattie*, 733 F.Supp at 1458.

⁴⁶³ *Ford v. Southeast Atlantic Corp.*, 588 So.2d 1039 (1991).

benefits, which were denied by a referee. The court found that there was sufficient evidence to support claims of misconduct, as established by the appellant's failing a drug test. However, the court held that the Unemployment Appeals Commission should have made specific findings as to whether the employee was suffering from drug addiction in the medical sense and whether the addiction caused the misconduct. The appellant was aware of the company's drug testing policy. It was unrefuted that the appellant tested positive for cocaine use.

Section 443.101(1)(a) of the Florida Statutes (1989) provides that an individual shall be disqualified from receiving unemployment compensation benefits if the Division of Unemployment Compensation finds that the employee has been discharged by the employer for misconduct. The appellant argued repeated acts of misconduct should have been documented before his termination, but the court rejected that argument. However, the court ruled that the appellant's misconduct, if a result of drug addiction, should not preclude him from receiving unemployment compensation benefits, in accordance with the Florida Administrative Code 38B-2.01(5)(b). The court held that if it is determined that an individual is suffering from alcoholism or drug addiction in a medical sense that such is an illness, which should be considered in determining eligibility for unemployment compensation benefits. The appellant had used the addiction defense before the referee;

therefore, the court remanded the case to the Commission for redetermination of the appellant's eligibility.⁴⁶⁴

Employee drug testing as it relates to collective bargaining is the focus of the 1991 case *Miami v. F.O.P.*, *Miami Lodge 20*, and *Florida Public Employees Relations Commission*.⁴⁶⁵ The thrust of the case is not, as the court pointed out, "whether drug testing of police officers is advisable," rather, "the quite ordinary issue of whether compulsory drug testing of police officers employed by a city is a subject of mandatory collective bargaining between the city and the union which represents the officers."⁴⁶⁶ The police union filed an unfair labor practice charge against the city. Subsequently, the Public Employees Relations Commission (PERC) ordered the city to cease and desist from requiring police officers to submit to drug testing. The city appealed. Originally, the District Court of Appeal, Third District, affirmed. However, on rehearing en banc, the court held that (1) drug testing of police officers falls within the management prerogative of the city and thus was not a subject of mandatory collective bargaining; and (2) the "Right to Work" provision of the Florida Constitution did not require that the drug testing of police officers be a mandatory subject of collective bargaining.⁴⁶⁷

⁴⁶⁴ *Id.* at 1041.

⁴⁶⁵ *Miami v. F.O.P.*, 571 So.2d 1309 (1991).

⁴⁶⁶ *Id.* at 1311.

⁴⁶⁷ *Id.* at 1328.

Opinions of the judges varied as two dissented; two concurred in part and dissented in part; and another specially concurred.⁴⁶⁸ The final decision was a reversal in favor of the city.

While not specifically related to employee drug testing, the 1991 case of *Hayes v. Florida*⁴⁶⁹ offers some insight on the issues of notification and the permissibility of random drug testing. The defendant was convicted in the Circuit Court, Bay County, of robbery, and appealed, challenging certain conditions of his probation. The appellant's requirement to pay costs associated with his participation in a work program was not orally pronounced at time of sentencing. The District Court of Appeal, First District, ruled that because this special condition was not orally pronounced, it had to be stricken from the written order. The appellant was also ordered to submit to blood, breathalyzer and urinalysis examinations. The court upheld that requirement because "random testing" is provided for in section 948.03(1)(j) of the Florida Statutes.⁴⁷⁰

The 1992 case of *Fraternal Order of Police, Miami Lodge 20 v. Miami*⁴⁷¹ should be of particular interest to Florida community college officials whose faculty have union

⁴⁶⁸ *Id.* at 1330, 1331

⁴⁶⁹ *Hayes v. State of Florida*, 585 So.2d 397 (1991).

⁴⁷⁰ *Id.* at 398.

⁴⁷¹ *F.O.P. v. Miami*, 609 So.2d 31 (1992).

representation. The case focuses on two incidents involving City of Miami police officers using or purchasing drugs in June 1985, prompting the city to require the subjects to submit to drug testing. In the first case, an officer was allegedly seen using cocaine, and was subsequently ordered to submit to a drug test. The officer refused and was terminated. In the second case, two officers were accused of purchasing marijuana and were ordered to submit to drug tests. They submitted to the tests, at the advice of their union, under protest, and tested negative. Subsequently, the union filed unfair labor practices charges against the city in response to the city requiring the police officers to submit to drug testing as a condition of continued employment. The Public Employees Relations Commission (PERC) ruled that drug testing is the subject of mandatory collective bargaining and ordered the city to cease and desist from unilaterally requiring police officers to submit to drug testing. The city appealed, and the Third District Court of Appeal reversed and certified the following question: Is the compulsory drug testing of police officers a mandatory subject of collective bargaining or, in the alternative, may a governmental entity require its police officers to submit to drug testing without having first entered into collective bargaining regarding the subject?⁴⁷²

⁴⁷² *Id.* at 32.

The Supreme Court of Florida held that although mandatory collective bargaining is necessary for random drug testing of police officers in the absence of express legislation, such testing is permissible and within the management prerogative when there exists some evidence of drug involvement by specific officers. The court ruled that, generally, a public employer may act unilaterally if conduct or action does not fall within statutory definition of mandated bargaining subjects or if it is considered a permissive subject because it falls within managerial prerogative. The court held that when the subject that must be collectively bargained is arguably both a managerial prerogative and a term or condition of employment, that a balancing test is necessary to determine which characteristic predominates.

In upholding the lower court decision, the Supreme Court reasoned that to hold otherwise would adversely affect public safety, given the responsibility and discretionary authority of police officers. The court viewed the case as "narrow" in that it involved public safety and sworn police officers who carry firearms and exercise considerable discretion in enforcing the law. It was stressed that police officers are not "the average public employee," rather, a specific category of public employees which is entrusted with the public safety.⁴⁷³ The court held that police

⁴⁷³ *Id.* at 34.

officers occupy a position in which the public has the right to have absolute public trust. Public safety and protection, the court held, cannot wait for a bargaining session.

Justices emphasized

that our holding allowing testing in this instance does not mean we are holding that public employers of public safety personnel have the managerial prerogative to require random drug testing of all public safety personnel. Our decision allowing testing in this circumstance is narrow and is based on an overriding need to protect the public.⁴⁷⁴

The court cited both *Skinner* and *Von Raab* in its opinion. Moreover, justices allowed that drug testing should be performed in accredited medical facilities in accordance with standardized and accepted medical procedures. Justices also allowed that due process mandates that police officers have the right to challenge the validity of the procedure and the tests utilized.⁴⁷⁵

Another 1992 case, *Smith v. Bendix Field Engineering Corporation*,⁴⁷⁶ offers additional insight on the doctrinal issues of public safety and right to privacy. The plaintiff alleged that Bendix violated his Fourth Amendment right against unreasonable searches and seizures; his Fifth Amendment right against self-incrimination; and his right to privacy by forcing him to submit to drug-screening tests as

⁴⁷⁴ *Id.* at 35.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Smith v. Bendix*, 1992 W.L. 316313 (M.D.Fla.) (not reported in F.Supp.).

part of his employment.⁴⁷⁷ The case, heard by the U.S. District Court, M.D. Florida, Jacksonville Division, also involved claims of defamation, wrongful discharge, and intentional infliction of emotional distress.

Whether Bendix was a state actor was also at issue. The court alluded to Section 1983, which states that

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁴⁷⁸

In order for the plaintiff to have stated a *prima facie* cause of action based on a Fourteenth Amendment violation under Section 1983, the court said the plaintiff must have proven that the challenged conduct constituted both color of law and state action. The plaintiff contended that Bendix was a federally connected contractor and argued that federal statutes and constitutional guarantees applied to its actions. The court disagreed with the plaintiff, holding that it was unaware of any "conceded control" the federal government had over Bendix, and that nothing in Bendix's file exhibited any relationship between the government and Bendix with the exception of the plaintiff's "bald,

⁴⁷⁷ *Id.* at 1.

⁴⁷⁸ *Id.*

conclusory allegations."⁴⁷⁹ The court saw no nexus between Bendix's conduct and the federal government; therefore, the court dismissed Smith's Fourth and Fifth Amendment claims.

As for the plaintiff's wrongful discharge claim, the plaintiff alleged that he had entered into an employment contract with Bendix to service equipment in its maritime program. The court ruled, however, that he failed to make any allegations with respect to the terms and conditions of employment. The court said that

it is well established under Florida law that where a contract of employment is of indefinite duration, an employer may terminate an employee at will, thus precluding the employee from pursuing an action for breach of contract or wrongful discharge.⁴⁸⁰

The court ruled that the plaintiff not only failed to show the existence of a contract, but also any breach of the provisions thereof.

The plaintiff's claim of invasion of privacy was likewise dismissed. The plaintiff alleged that Bendix had disclosed the fact that he had been terminated for failure to comply with company policy to "at least one of the Plaintiff's employers."⁴⁸¹ The court ruled that the plaintiff's claim did not constitute an invasion of privacy under Florida law, which states that an invasion of privacy by publication of private facts has four elements: (1) the

⁴⁷⁹ *Id.* at 2.

⁴⁸⁰ *Id.* at 3.

⁴⁸¹ *Id.*

disclosure must be public; (2) private facts were disclosed; (3) the matter publicized was highly offensive to a reasonable person; and (4) the matter was not a legitimate public concern.⁴⁸² In *Smith*, the court held that the plaintiff failed to establish that a private fact was disclosed or that the matter publicized was highly offensive to a reasonable person.

The plaintiff's defamation claim was also dismissed. As was the issue in the invasion of privacy claim, the court ruled that the plaintiff failed to show defamation as defined under Florida law, which states that in order to establish a cause of action it must be proven that (1) false and defamatory statements of and concerning him were published; (2) the statements were published without reasonable care as to whether the statements were true or false; and (3) the statements resulted in actual damage to the plaintiff.⁴⁸³ The court noted that under Florida law, an employer has qualified privilege in communicating information about a former employee to a prospective employer. That privilege extends not only to communications regarding an employee's job performance, but also to any information which is relevant to the inquiry being made.⁴⁸⁴

⁴⁸² *Heath v. Playboy Enterprises, Inc.*, 732 F. Supp. 1145 (S.D.Fla. 1990); *Cape Publications Inc., v. Hitchner*, 549 So.2d 1374 (Fla.) (1989).

⁴⁸³ *Miami Herald Publishing Co. v. Ane*, 423 So.2d 376 (Fla. 3d DCA 1982).

⁴⁸⁴ See *Nodar v. Galbreath*, 462 So.2d 803 (Fla. 1984); *Boehm v. American Bankers Insurance Group*, 557 So.2d 91

The court held that the plaintiff did not plead any facts that would overcome Bendix's qualified privilege, and that he also failed to allege any malice.⁴⁸⁵

The plaintiff similarly failed to prove his claim of intentional infliction of emotional distress. Florida has adopted the definition of this cause found in the Restatement (Second) of Torts, s 46 (1965). A key element of the definition is that the conduct must be interpreted by an average person in the community as extreme, outrageous and atrocious. The court noted that the Eleventh Circuit had recognized four elements which a plaintiff must prove to succeed on a claim of intentional infliction of emotional distress: (1) deliberate or reckless infliction of emotional suffering; (2) by outrageous conduct; (3) which conduct must have caused suffering; and (4) the suffering must have been severe.⁴⁸⁶ At most, the court ruled, Smith alleged facts that might be characterized as negligent, but fell far short of behavior which could be termed "atrocious and utterly intolerable in civilized community."⁴⁸⁷

The 1993 case *Underhill v. Publix Super Markets*, and the Florida Unemployment Appeals Commission⁴⁸⁸ is of

(Fla. 3d D.C.A.) (1990); *Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816, 817 (Fla. 5th D.C.A. 1985).

⁴⁸⁵ Smith, *supra* note 476, at 4.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 5.

⁴⁸⁸ *Underhill*, 610 So.2d 48.

particular import where the doctrinal issue of consent is involved. The plaintiff, a Publix employee, was discharged for misconduct. She was subsequently disqualified from unemployment compensation benefits. Publix's employment policies, instituted after the plaintiff was hired, require employees to submit to drug testing upon demand without regard to probable cause or reasonable suspicion. The plaintiff was directed to an off-site, independent laboratory for the purpose of being tested, and agreed to submit. However, when asked to sign a statement indicating the test was voluntary, she refused to sign, saying she would not "sign something saying I'm doing it voluntarily when it's not voluntary."⁴⁸⁹ The plaintiff claimed she was being harassed and informed her supervisor that although she would submit to the drug test, that she would not sign the consent form since she was not submitting to the test voluntarily. Following the plaintiff's termination, an appeals referee upheld lower administrative determinations denying the plaintiff's claim for unemployment benefits.

Upon further appeal, the District Court of Appeal, Third District, held that the employee's refusal to execute document stating that her submission to a drug test was voluntary, when in fact testing was compulsory, did not constitute employment misconduct. The court disagreed with the appeals referee that the plaintiff's refusal to sign the

⁴⁸⁹ *Id.* at 49.

form constituted a refusal to submit to the test. The court, therefore, reversed the decision of the Appeals Commission. The court held that the Florida Statutes on unemployment misconduct as related to denying an individual unemployment compensation benefits, Section 443.036(26), should be liberally construed in favor of the claimant.

Although the legality of Publix's employee drug testing program was not at issue, the court alluded to it, saying, "Whatever concerns the employer may have had for legal challenges by employees to its valid drug testing program was already the subject of voluntarily executed pre-employment and continued-employment agreements."⁴⁹⁰ To reiterate, Publix's random drug testing program did not involve probable cause nor reasonable suspicion considerations.

Another 1993 case, *Warrior & Gulf Navigation Company v. United Steelworkers of America*⁴⁹¹ focuses on employee drug testing as related to collective bargaining. An employee of Warrior & Gulf Navigation Co., the plaintiff submitted to a drug test in April 17, 1991 in accordance with a collective bargaining agreement. The plaintiff, who had earlier been suspended for a positive test in 1988, tested positive. Prior to receiving the results of the April 17 test, the plaintiff was tested again on April 29. The employee tested

⁴⁹⁰ *Id.*

⁴⁹¹ *Warrior Gulf v. United Steel Workers*, 996 F.2d 279 (1993).

positive on April 17, but negative on April 29. After the company received the results of the April 17 test, it fired the plaintiff.

The union disagreed with the decision and asked that an arbitrator adjudicate the dispute. The arbitrator reduced the plaintiff's penalty to a suspension, stating that the collective bargaining agreement's "just cause" provision required the employer to use "just and equitable" procedures in firing the plaintiff. The arbitrator ruled that by requiring the plaintiff to submit to a second drug test on April 29, the company "changed the rules of the game,"⁴⁹² establishing the expectation that the plaintiff's continued employment hinged on the second test, which he passed. The plaintiff's passing the second test, the arbitrator stated, caused the employer to fail to show just cause for the employee's termination. Stated differently, "just cause" means that the employee must be given a "fair shake."⁴⁹³

Upon the company's appeal to the United States District Court, Southern District of Alabama, the court entered judgment for the employer. The union appealed to the United States District Court of Appeals, Eleventh Circuit, which held that the arbitrator lacked discretion under the collective bargaining agreement to reinstate an employee who had twice been tested positive for drug use. The appeals

⁴⁹² *Id.*

⁴⁹³ *Id.* at 280.

court ruled that an arbitrator does not have unfettered discretion. Thus, an arbitrator cannot impose a remedy that directly contradicts express language of a bargaining agreement.

The doctrinal issue of due process is the thrust of the 1993 case *Martin v. Alabama*.⁴⁹⁴ *Martin* was ultimately decided by the Court of Criminal Appeals of Alabama. An inmate, the plaintiff, was charged with consumption of a controlled substance. The prisoner challenged the prison disciplinary board's action against him, and the Escambia Circuit Court denied his petition. The plaintiff appealed to the Court of Criminal Appeals, which reversed and remanded the decision, ruling that the prison disciplinary board should have introduced oral and/or documentary evidence that a valid chain of custody of the plaintiff's urine sample existed. Without establishing a valid chain of custody, the evidence against the inmate was ruled inadmissible.

The court held that in order for the board to meet Alabama's due process standard, its decisions must not be arbitrary nor capricious and must be based on some evidence. However, the court did allow that the plaintiff was not entitled to a copy of the chain of custody form for the urine sample prior to the disciplinary hearing. A new disciplinary hearing was ordered for the plaintiff.

⁴⁹⁴ *Martin v. State of Alabama*, 616 So.2d 384 (1993).

Yet another 1993 employee drug testing case, *Parker v. Atlanta Gas Light Co.*,⁴⁹⁵ decided by the United States District Court, S.D. Georgia, involves the doctrine of state action. A former employee of Atlanta Gas Light Co., the plaintiff brought suit against the company after he was fired for failing urinalysis drug screening. The plaintiff claimed his constitutional guarantees under the Fourth and Fifth Amendments had been violated. However, the employer filed a motion to dismiss on the ground that it was not a state actor for the purpose of federal constitutional claims. The court held that state actor status could not be based on the Drug-Free Workplace Act of 1988⁴⁹⁶ because neither the Act nor any regulation cited thereunder required the employer to perform drug testing.

The employer contended that despite its status as a public utility, its actions in discharging the plaintiff could not be equated with state action for the purposes of a constitutional challenge. Also, since the Drug-Free Workplace Act of 1988⁴⁹⁷ does not require employers to maintain a drug testing program, testing performed by the employer could not have been under the authority of the Act for the purposes of finding state action. The court held that the employer's arguments were correct. The court noted

⁴⁹⁵ *Parker v. Atlanta Gas Light*, 818 F. Supp. 345 (1993).

⁴⁹⁶ 41 U.S.C. §§ 701-707 (Supp. 1991).

⁴⁹⁷ *Id.*

that the Fourth and Fifth Amendments "protect only against invasion of civil liberties by the government whose conduct they alone limit." The fact that the utility is subject to extensive government regulation does not convert the business of the utility to government action.

Florida Community College Employees as State Actors

As previously noted in this chapter, Fourth Amendment guarantees against unreasonable search and seizures actions can be invoked only when the search and seizure actions are state or government actions.⁴⁹⁸ Given that the focus of this study is on Florida community college substance abuse policies, it is appropriate to examine the status of those colleges and their employees as potential state actors.

An opinion issued by the Attorney General of the State of Florida, entitled "Community Colleges: Employees Not 'State' Employees,"⁴⁹⁹ speaks to the state action issue. In that opinion, the question was posed, "Are employees of a community college district state employees . . . ?"⁵⁰⁰ While the Attorney General allowed that community colleges serve a dual function, "both state and local," and noted community colleges are funded by student fees and state funds, the

⁴⁹⁸ Powe, 407 F.2d 73 (2d Cir. 1968); see also Richard A. Stanley, *Drug Testing in the Workplace Creates New Judicial Doctrine*, 12 NAT'L L. J. 20 (col 2) (October 16, 1989).

⁴⁹⁹ Fla. AGO 080-64 (July 14, 1980).

⁵⁰⁰ *Id.*

summary cited Section 240.301 of the Florida Statutes and included the following statements:

This office, recognizing the unique position occupied by community colleges and stating that such colleges serve a 'distinctly local function,' concluded that a community college was not a state agency. This conclusion has been reaffirmed, expressly or implied, in later opinions of this office.⁵⁰¹

The Florida Statutes, in several sections, refer to the status of community colleges. Among these are

- (1) Community colleges shall consist of all educational institutions which are operated by local community college district boards of trustees under specific authority and regulations of the State Board of Education.⁵⁰²
- (2) A community college district is part of the state system of public education.⁵⁰³
- (3) State community colleges shall consist of all public educational institutions operated by community college district boards of trustees under statutory authority and rules of the State Board of Education and the State Board of Community Colleges.⁵⁰⁴

⁵⁰¹ *Id.*

⁵⁰² FLA. STAT. ch. 228.041 (1)(b) (1993).

⁵⁰³ FLA. STAT. ch. 228.041 (21) (1993).

⁵⁰⁴ FLA. STAT. ch. 240.301 (1) (1993).

- (4) There is established a State Board of Community Colleges with the necessary powers to exercise responsibility for statewide leadership in overseeing and coordinating the individually governed public community colleges.⁵⁰⁵
- (5) Each community college district authorized by law and the Department of Education is an independent, separate, legal entity created for the operation of the community college.⁵⁰⁶
- (6) It is the legislative intent that community colleges, constituted as political subdivisions of the state, continue to be operated by district boards of trustees as provided in s. 240.315 and that no department, bureau, division, agency, or subdivision of the state exercise any responsibility and authority to operate any community college of the state except as specifically provided by law or rules of the State Board of Education and State Board of Community Colleges.⁵⁰⁷
- (7) Full-time state employees include all full-time employees of all branches or agencies of state government holding salaried positions and paid by

505 FLA. STAT. ch. 240.305 (1993).

506 FLA. STAT. ch. 240.313 (1) (1993).

507 FLA. STAT. ch. 240.317 (1993).

state warrant or from agency funds, and employees paid from regular salary appropriations for eight months' employment, including university personnel on academic contracts, but in no case shall "state employee" or "salaried position" include persons paid from other personal services (OPS) funds.⁵⁰⁸

Though government funding is a major consideration in determining state action, more is involved than monetary issues.⁵⁰⁹ Even accepting the premise that Florida community colleges are not state actors,⁵¹⁰ it remains that three approaches have emerged for attributing state action to an ostensibly private entity. Those are (1) when the entity acts as an agent of government in performing a task delegated to it by government; or (2) when the entity performs a function generally considered the responsibility of government; or (3) when the entity obtains substantial

⁵⁰⁸ FLA. STAT. ch. 110.123 (2)(c) (1993).

⁵⁰⁹ WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, 2ND ED. 18 (Jossey-Bass Publishers) (1989).

⁵¹⁰ At least one independent agency, Florida TaxWatch, Inc., supports the premise that community college employees are not state employees. In a press release, TaxWatch President Dominic Calabro wrote, "The community colleges take general direction from the Florida Legislature, but Clark Maxwell's (Executive director of the State Board of Community Colleges) office has little control over them. They are operated by 28 separate appointed boards with a minimum of oversight by elected officials at any governmental level. Teachers and administrators are employees of college boards - not of the state - unlike university employees." See Dominic M. Calabro, *TaxWatch Examines Community College Presidents' Salaries and Perks*, FLORIDA TAXWATCH NEWS RELEASE (Dec. 13, 1993).

resources, prestige, or encouragement from its contracts with government.⁵¹¹ Thus, it can be argued that state action is evident where an entity and the state have a symbiotic relationship or a substantial nexus.⁵¹² If any of these elements are present, the entity's actions may be considered state action subject to constitutional constraints.⁵¹³

A 1989 California case illustrates the point that the right to be free from unreasonable search and seizure actions can extend to the private sector. In *Wilkinson v. Times Mirror Corp.*,⁵¹⁴ the California Court of Appeals considered whether drug testing of job applicants violated the right of privacy set forth in the California Constitution. The court held that the state constitutional right of privacy applied both to governmental and private conduct. Therefore, in California, governmental action is not required to trigger the state constitutional right of privacy.⁵¹⁵

⁵¹¹ *Id.*

⁵¹² See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948).

⁵¹³ Kaplin, *supra* note 509, at 18.

⁵¹⁴ 215 Cal. App. 3d 1034 (1st Dist. 1989).

⁵¹⁵ Mark E. Brossman, *Workers Gain Privacy Rights by Legislation, Judicial Action*, 12 NAT'L L. J. 28 (col 2) (April 9, 1990).

CHAPTER III METHODOLOGY

Two methods of legal research, policy study and traditional legal research, were employed in this study. This was appropriate because the purpose of the study was to develop a model employee substance abuse policy, including a drug screening option, designed to provide Florida community college governing board members and administrators with a resource to assist in formulating drug-free workplace policies that reflect institutional philosophies and missions. To accomplish this task, it was prudent to approach the topic not only from a traditional legal research perspective, but also from a policy study standpoint.

Legal research is generally defined as a systematic investigation that involves interpretation and explanation of the law.¹ This inquiry involves a time line that looks to the past, present and future. The historical nature of legal research involves its reliance on precedent, as America's legal system is based on the principle of *stare decisis* or the concept that a ruling of the highest court in a given jurisdiction is binding authority on lower courts within its

¹ Charles J. Russo, *Legal Research: The 'Traditional' Method*, 28 NOLPE NOTES 2 (October 1993).

jurisdiction.² Thus, the United States Supreme Court cases of *Skinner*³ and *Von Raab*⁴ are central to any examination of employee drug testing. As the researcher studies emerging questions, he or she must examine past authoritative rulings on the same subject.

Policies have been defined as "manifestations of choices society has made about its future."⁵ Studying policies involves the examination of the options considered and those not considered and of the impact of those choices, both long- and short-term.⁶ A policy study is research that is "specifically directed at providing policy makers with the options and information they need to solve the problems we face today."⁷ Thus, the policy study methodology was employed in analyzing current substance abuse policies of Florida's public community colleges and in designing a model policy that might assist leaders of those institutions in future policy-making.

² *Id.*

³ *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 109 S.Ct. 1402 (1989).

⁴ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989).

⁵ Patricia F. First, *Researching Legal Topics With a Policy Studies Perspective*, 29 NOLPE NOTES 1 (January 1994).

⁶ *Id.*

⁷ A. MAJCHRZAK, *METHODS FOR POLICY RESEARCH* 11 (Sage Publishers) (1984); see also First, *supra* note 5, at 1.

Timeliness is a key factor in the validity or usefulness of a policy study.⁸ If the policy study is completed after governing board members have ruled on a given issue, the value of the study may be greatly diminished. On the other hand, if the policy study is accomplished before definitive rulings are made, it may prove invaluable in guiding decision-makers.⁹

This study can be characterized as a combination of "Evaluation Research" and "Policy Research Before Decision Making."¹⁰ This characterization is based on the fact the study not only evaluated current employee substance abuse policies, but ultimately resulted in the development of a model employee substance abuse policy designed to assist community college leaders considering establishing urinalysis programs or changing current policies.

Sources of Information

In studying employee drug testing in the sense of traditional legal research, three fundamental sources of information were utilized: primary, secondary, and research tools. In this study, the University of Florida Law Library proved invaluable in locating information manually, e.g., books and law review articles. In addition, much information was obtained electronically, through computer data bases.

⁸ First, *supra* note 5, at 2.

⁹ *Ibid.*

¹⁰ First, *supra* note 5, at 2.

Primary sources included the United States Constitution; federal regulations on employee drug testing, such as Executive Order 12,564, the Drug-Free Workplace Act,¹¹ and the Drug-Free Schools and Communities Amendments of 1989;¹² case law ranging from United States Supreme Court decisions to Florida state courts; and relevant sections of the Florida Statutes, such as the Florida Drug-Free Workplace Act¹³ and the "Florida Drug-Free Workplace Program Requirements."¹⁴ Federal Regulations were found in the United States Code (U.S.C.), and United States Code Annotated (U.S.C.A.), and the United States Code Service (U.S.C.S.). Special emphasis was placed on case law of the Eleventh Judicial Circuit, of which Florida is a part.

Secondary sources included literature on employee drug testing and other related topics, such as intrusions upon Fourth Amendment rights. The literature included law review articles, books and monographs, legal encyclopedias and dictionaries, and other periodicals. Additional research tools employed were *Black's Law Dictionary*, *Corpus Juris Secundum*, *Shepherd's Citations*, and the *Index to Legal Periodicals*. WESTLAW was also utilized. *Black's Law Dictionary* provided definitions of terms central to the

¹¹ 41 U.S.C. §§ 701.707 (Supp. 1991).

¹² 20 U.S.C. § 3224(a) (1989).

¹³ FLA. STAT. § 112.0455 (1993).

¹⁴ FLA. STAT. § 440.102 (1993).

study. *Corpus Juris Secundum* provided definitions of legal doctrines associated with employee drug testing, and *Shepherd's Citations* was used to determine the current validity and case history of relevant cases. In addition, ERIC and *Dissertation Abstracts* were employed as finding tools.

Data Organization

Data were presented in some instances topically and in others chronologically. Topical presentation provided a means to organize a considerable amount of literature on employee drug testing, and chronological presentation provided a means of organizing much of the case law.

Data Analysis

Federal regulations were reviewed to identify the current legal provisions which have contributed to the evolution of laws relevant to the employee drug testing in both the public and private sectors. Court decisions and the legal doctrines therein were analyzed individually. Critical legal commentary was also reviewed, which offered insight relative to the legal principles and corroboration of court findings in employee drug testing cases and other cases involving search and seizure actions.

Synthesis

A legal analysis of relevant cases was conducted followed by a summary analysis that served to integrate the

results of the research. This analysis provided an explanation of how the law concerning employee drug testing has evolved.

Subsequently, the data were reviewed in the context of Florida community college substance abuse policies. Each policy was analyzed in an effort to determine its comportment with relevant federal and state regulations and case law. This analyses guided the formulation of a model substance abuse policy and drug screening option for Florida community colleges. Synthesis of these data provided a better understanding of how and why legal concepts evolved. The conclusions of the synthesis provided the framework for the aforementioned model substance abuse policy as well as suggestions for further study.

Standards for Adequacy for Legal Research

Evaluating legal research is unlike judging other forms of higher education research. Criticism of sources is a fundamental concern of legal research.¹⁵ The external criticism of source authenticity was addressed through the employment of established legal citation standards which provide appropriate documentation.¹⁶ The trustworthiness and accuracy of stated facts is a matter of internal criticism.

¹⁵ JAMES H. McMILLAN AND SALLY SCHUMACHER, RESEARCH IN EDUCATION: A CONCEPTUAL INTRODUCTION 2D ED. 446-448 (Scott, Foresman & Co.) (1989).

¹⁶ HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION, 15TH ED. (Gannett House) (1991).

The researcher addressed these concerns by evaluating court cases chronologically with an emphasis on decisions in the Eleventh Judicial Circuit, of which Florida is a part. Accuracy was addressed by considering the motivations of concerned parties, common knowledge on the issue, and the agreement of statements with other known facts.¹⁷

Legal research is descriptive, in that it reveals "what is."¹⁸ However, legal research, in the form of policy study, can also have predictive value.¹⁹ Thus, the researcher sought to develop this study beyond the parameters of traditional legal research, to include the formulation of a series of model employee substance abuse policies for Florida community colleges, which appear in Chapter V of this study.

¹⁷ McMILLAN AND SCHUMAKER, *supra* note 16, at 448.

¹⁸ SHARAN B. MERRIAM AND EDWIN L. SIMPSON, A GUIDE TO RESEARCH FOR EDUCATORS AND TRAINERS OF ADULTS, UPDATED ED. 63 (Robert E. Krieger Publishing Co.) (1989).

¹⁹ First, *supra* note 5, at 2.

CHAPTER IV
ANALYSIS OF FLORIDA COMMUNITY COLLEGE
SUBSTANCE ABUSE POLICIES

The purpose of this study was to develop a model employee substance abuse policy for the Florida community college system. Judicial response relative to drug screening was a particular focus. The study involved two major analyses. First, a review of germane case law, state statutes, and federal legislation produced two seminal U.S. Supreme Court decisions, numerous lower court rulings, and several state and federal acts, all of which contributed to an understanding of the status of public employee drug testing. Second, current substance abuse policies and related literature were collected from the twenty-eight institutions in the Florida community college system. Information resulting from a review of case law and relevant legislation served as a basis for an analysis of current Florida community college substance abuse policies.

Analysis of Case Law Concerning Employee Drug Testing

Skinner v. Railway Labor Executives' Association¹ and National Treasury Employees Union v. Von Raab,² are the

¹ Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989), 109 S.Ct. 1402.

seminal cases on the legality of civilian public employee drug testing. The cases well establish that drug testing is a search and seizure action subject to the protections guaranteed by the Fourth Amendment to the U.S. Constitution.³ Despite the Fourth Amendment explicitly prohibiting unreasonable search and seizure actions and stipulating that no warrants should be issued except on probable cause, federal courts have consistently ruled that neither a warrant nor probable cause are prerequisites to testing certain public employees for illicit drug use.⁴ The courts have mandated, however, that drug testing be reasonable.⁵ The concept of reasonableness, in the majority of cases, has involved the presence of individualized suspicion that a public employee is using illicit drugs or is otherwise under the influence of same.⁶

The significance of *Skinner* and *Von Raab* is that, in both cases, the Supreme Court relaxed Fourth Amendment

² *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), 109 S.Ct. 1384 (1989).

³ *Skinner*, 489 U.S. 602 (1989), 109 S.Ct. 1402 (1989). See also *Amalgamated Transit Union, Local 1277 v. Sunshine Transit Agency*, 663 F.Supp. 1560 (C.D. Cal. 1987); *McDonnell*, 809 F.2d 1302 (8th Cir. 1987); *Capua*, 643 F.Supp. 1507 (D.N.J. 1986); *Jones v. McKenzie*, 628 F.Supp. 1500, 1506 (D.D.C. 1986); *Allen*, 601 F.Supp. 482 (N.D.Ga. 1985); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1298-99 (9th Cir. 1991).

⁴ *Skinner*, 489 U.S. at 612-613 (citing *Railway Labor Exec. Ass'n v. Burnley*, 839 F.2d 575, 583, 587 (1988)).

⁵ *Id.*

⁶ *Id.*

safeguards to permit suspicionless drug testing of certain employees, i.e., those performing "safety sensitive" jobs; and/or occupying positions demanding proof of integrity to a drug prevention job mission; or holding posts with access to "truly sensitive information."⁷ The cases created a balancing test which weighs the employee's right to privacy against governmental interests.

A major consideration of the Court was the employees' expectation of privacy, diminished by reason of their participation in an industry (railroad) heavily regulated by the government to ensure safety,⁸ and their regularly discharging duties "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."⁹ In *Von Raab*, the Court rendered a decision on the Constitutionality of mandatory drug testing of U.S. Customs Service employees seeking promotion to positions directly involved in illicit drug interdiction, or those required to carry a firearm, or those having access to classified material.¹⁰ The Court stated that the purposes of the drug testing program were to deter illicit drug use among employees who sought promotion to certain sensitive positions and to prevent the promotion of drug users to

⁷ *Von Raab*, 489 U.S. at 670.

⁸ *Id.* at 627.

⁹ *Id.* at 628.

¹⁰ *Id.* at 660-61.

those posts.¹¹ The Court recognized those interests as substantial and, thus, a warrant and a finding of individualized suspicion were not required.¹²

As to what guidance *Skinner* and *Von Raab* might offer Florida community college officials desiring to establish drug screening programs, it is clear that the Court's decisions do not provide the government with carte blanche in drug testing employees. The focus of *Skinner* and *Von Raab* was narrow--suspicionless, uniform drug testing of government employees in positions directly linked to public safety or national security. Employee categories will undoubtedly be the most litigated aspect of government drug testing cases in the future.¹³

That being the case, a review of Florida public community college categories of employees was appropriate for this study.¹⁴ The review was conducted by examining the personnel sections of a sampling of catalogs of the colleges.¹⁵ In addition, the researcher examined specific

¹¹ *Id.* at 666.

¹² *Id.*

¹³ *Id.*

¹⁴ See, e.g., *Taylor v. O'Grady*, 888 F.2d at 1189; *Cheney*, 884 F.2d at 614-15; *Harmon v. Thornburg*, 878 F.2d at 490; *Transportation Inst.*, 727 F.Supp. at 648; *American Federation of Gov't Employees v. Thornburgh*, 720 F.Supp. 154 (N.D. Cal. 1989).

¹⁵ According to the college catalogs, Florida community college employees were generally listed in one of three overall categories, administration, faculty, and career service. The latter category was also sometimes referred to as institutional support. Administration generally contained

job descriptions from the personnel office of a Florida community college to discern what direct links, if any, the jobs have with public safety or national security.¹⁶ Nothing in the job descriptions specifically addressed safety or security issues with the possible exceptions of security guard and uniform building code inspector.

several subheadings, i.e., senior administration, deans, directors, and coordinators. Faculty, at some institutions, were listed according to professorial rank and teaching discipline. Examples of teaching disciplines in traditional academic areas included English, biological science, physical science, psychology, foreign language, music, computer science, drama, philosophy, journalism, humanities, speech, physical education, history, mathematics, sociology, and reading. Examples of teaching disciplines in the vocational/technical or occupational areas included accounting, nursing, criminal justice, air conditioning and refrigeration, cosmetology, welding, automobile body repair, emergency medical technology, paramedics, electronics, automotive mechanics, drafting, radiation protection, office systems technology (secretarial science), drafting and design, interior design, and business law. In addition, each college had a continuing education component and employed faculty, either full- or part-time, to teach an array of short-term courses not for regular college credit, e.g., real estate, insurance, travel agent, first aid, elderhostel, and a variety of hobby/recreational courses from bridge to aerobics.

Career service or institutional support was perhaps the most diversified category of community college employees. Examples of career service positions listed in Florida community college catalogs included secretary, custodian, clerk, accountant, purchasing agent, trades worker, information specialist, landscape caretaker, photographer, financial aid staff assistant, theater manager, learning resources paraprofessional, horticulture aid, computer specialist, interpreter for the hearing impaired, computer service technician, locksmith, computer programmer, grants writer, graphic artist, typesetter, groundskeeper, mail courier, library assistant, security guard, insurance specialist, curator, and tour coordinator.

¹⁶ The researcher examined official job descriptions of Central Florida Community College employees in the college personnel office on June 6, 1994.

Analysis of Post-Skinner and Von Raab Lower Court Rulings

Lower federal courts have applied the principles established in *Skinner* and *Von Raab* to various public jobs. For instance, cases have involved the suspicionless drug testing of law enforcement¹⁷ and fire fighting municipal employees.¹⁸ The government has also cited its public safety interest to justify the testing of, e.g., truck drivers,¹⁹ railway workers,²⁰ and chemical weapons plant employees.²¹ Interests cited in other cases have ranged from providing a drug-free environment in public schools²² to maintaining the integrity of the horse racing industry.²³

A common thread in most lower court decisions subsequent to *Skinner* and *Von Raab* is that many cases have

¹⁷ See, e.g., *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C.Cir. 1989), *cert. denied*, 110 S.Ct. 864 (1990); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 404 (1989); *Brown v. City of Detroit*, 715 F.Supp. 832 (E.D. Mich. 1989).

¹⁸ See, e.g., *Brown v. Winkle*, 715 F.Supp. 195 (N.D. Ohio 1989).

¹⁹ See *Owner-Operators Indep. Drivers Ass'n of Am. v. Burnley*, 705 F.Supp. 481 (N.D. Cal. 1989); see also *American Fed'n of Gov't Employees v. Cavazos*, 721 F.Supp. 1361 (D.D.C. 1989).

²⁰ See *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988).

²¹ See *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989).

²² *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

²³ *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

continued to involve employees in safety-sensitive positions. As few Florida community college jobs have arguably a direct link with public safety, cases involving drug testing of government employees based on individualized suspicion may have more relevance for Florida community colleges. Two such lower court decisions are *American Federation of Government Employees v. Martin*²⁴ and *City and County of Denver v. Casados*.²⁵ In both cases, the courts upheld drug testing programs based on reasonable suspicion involving government employees in non-safety sensitive jobs. In *Casados*, the Colorado Supreme Court ruled that the Fourth Amendment did not bar drug testing of employees based on reasonable suspicion of on-duty drug use or off-duty drug use that manifested itself on the job. However, the court did allow that reasonable suspicion testing based solely on off-duty drug use that had no on-the-job implications was unconstitutional.²⁶

Analysis of Eleventh Judicial Circuit Drug Testing Cases

As Florida community college officials consider implementing employee drug screening programs, it is logical that particular attention should be provided cases involving

²⁴ *American Federation of Government Employees v. Martin*, 969 F.2d 788 (9th Cir. 1992).

²⁵ *City and County of Denver v. Casados*, 862 P.2d 908 (Colo. 1993).

²⁶ *Id.* at 913.

urinalysis within the Eleventh Judicial Circuit, which encompasses Florida, Georgia, and Alabama. The researcher examined Eleventh Circuit decisions spanning 1981 through 1993. Some cases may have more relevance for Florida's community colleges than others, and those decided subsequent to *Skinner* and *Von Raab* are logically the most valuable in terms of predicting judicial response. Eleventh Circuit decisions have been fairly consistent. Many involve plaintiffs who have held positions that impact public safety, such as police officers or firefighters. Of particular note are the following: *Beattie v. City of St. Petersburg Beach*,²⁷ *City of Miami v. Public Employees Relations Commission*,²⁸ *Smith v. Bendix*,²⁹ and *Underhill v. Publix*.³⁰

In *Beattie*, the City of St. Petersburg Beach's drug testing program was challenged by a firefighter who was being required to submit to urinalysis in the absence of any individualized suspicion. Despite the city's interest in public safety being recognized by the court as legitimate, the drug testing program was ruled unconstitutional because

²⁷ *Beattie v. City of St. Petersburg Beach*, 733 F.Supp. 1455 (1990).

²⁸ *City of Miami v. Public Employees Relations Commission*, 571 So.2d 1309 (1991).

²⁹ *Smith v. Bendix Field Engineering Corp.*, 1992 W.L. 316313 (M.D.Fla. 1992).

³⁰ *Underhill v. Publix Supermarkets Inc.*, 610 So.2d 48 (1992).

it was not based on reasonable suspicion, nor was any history of drug use established in the fire department nor had any accidents in the department been attributed to drug use. The court distinguished *Beattie* from *Skinner* in that the railroad industry in *Skinner* had established a history of drug problems. Also, in *Von Raab*, customs officials carried firearms; whereas, in *Beattie*, firefighters did not.

*Beattie*³¹ should provide Florida community college officials with some direction on establishing employee drug testing programs. *Beattie* suggests that employee drug testing programs, in the absence of a compelling government interest, must be conducted on the basis of reasonable suspicion. In addition, the fact that the court distinguished *Beattie* from *Skinner* and *Von Raab* demonstrates that courts are likely to narrowly interpret those seminal U.S. Supreme Court decisions. Therefore, the categories of Florida community college employees who can be legally tested for drug use, absent reasonable suspicion, may be limited to those who work in an area directly linked to public safety. *Beattie* also suggests that Florida community college officials who desire to implement employee drug testing may have to document a history of drug abuse among employees and/or accidents related to illicit drug use as a contributing factor in establishing a substantial and

³¹ *Beattie*, 733 F.Supp. 1455 (1990).

compelling governmental interest that would outweigh an employee's privacy rights.

*Underhill*³² may also provide Florida community college officials with valuable insights. In *Underhill*, the court spoke to the issue of consent in that the plaintiff was terminated for refusing to sign a drug testing consent form. The plaintiff contended the action of signing the form was not voluntary. The court ruled that the plaintiff's refusal to sign the form did not constitute employee misconduct. Therefore, it could be argued that a Florida community college employee may not have to sign a form consenting to drug testing if, in fact, the employee is not doing so on a voluntary basis. Signing a consent form when the alternative is termination may be viewed as coercion rather than consent.

For Florida community colleges involved in collective bargaining,³³ the cases of *City of Miami v. Public Employees Relations Commission*³⁴ and *Fraternal Order of Police v. City*

³² *Underhill*, 610 So.2d 48 (1992).

³³ According to the Florida Public Employees Relations Commission, as of April 1994, there were seven public community colleges currently involved in collective bargaining. They are Hillsborough Community College, FUSA; Indian River Community College, American Association of University Professors; Brevard Community College, United Faculty of Florida; Chipola Community College, Chipola Faculty Association; Edison Community College, ECC Faculty Federation, Local 3513; Broward Community College, Teamsters Local 769 and United Faculty of Florida, Local 1847; and Pensacola Junior College, PJC Faculty Association.

³⁴ *City of Miami*, 571 So.2d 1309.

of Miami³⁵ may provide other important legal perspectives. In both cases, the courts ruled that employee drug testing is a management prerogative, rather than a subject for mandatory bargaining. Therefore, it is arguable that governing board members and administrators of Florida community colleges involved in collective bargaining should not consider drug testing a bargainable issue.

Florida community college officials can gain further insight from the cases of *Ford v. Southeast Atlantic Corporation*³⁶ and *City of Ft. Lauderdale v. Florida Unemployment Appeals Commission*³⁷ in regard to unemployment compensation benefits. *City of Ft. Lauderdale* points out the need for organizations to follow certain rules of evidence in regard to employee drug testing. The plaintiff in the case was ultimately awarded unemployment compensation benefits because, at his hearing, no testimony was given by the chemist who conducted the analysis of the plaintiff's urine specimen. Therefore, the evidence presented was ruled hearsay. In *Ford*, the question at issue was whether the plaintiff's conduct (drug use), which caused his termination, constituted an illness. The court ruled that if the employee's drug use is determined to be an illness in a

³⁵ *Fraternal Order of Police v. City of Miami*, 609 So.2d 31 (1992).

³⁶ *Ford v. Southeast Atlantic Corp.*, 588 So. 2d 1039 (1991).

³⁷ *City of Ft. Lauderdale v. Florida Unemployment Appeals Commission*, 536 So.2d 1074 (1988).

medical sense, then the employee is eligible for unemployment compensation benefits.

Analysis of Florida Community College
Substance Abuse Policies

The researcher collected copies of substance abuse policies and other related literature from the human resource officers representing the twenty-eight Florida community colleges.³⁸ Analysis was limited to the materials furnished by each institution. Each policy was analyzed in

³⁸ The researcher collected the following policies from Florida community college human resource officers: Brevard Community College, Policy No. 102.84; Broward Community College, Policy Nos. 6Hx2-5.31, 6Hx2-5.06; Central Florida Community College, Policy No. 3-37; Chipola Junior College, Policy and Procedure No. 6Hx4-3.25; Daytona Beach Community College, Policy No. 8.11; Edison Community College, Policy No. 6Hx6:2.05; Florida Community College at Jacksonville, Board of Trustee's Rule No. 6Hx7-2.22; Florida Keys Community College Administrative Rule No. 6Hx-8-7.16; Gulf Coast Community College Policy Rule No. 6.105; Indian River Community College Rule Nos. 6Hx11-4.51, 6Hx11-5.51; Hillsborough Community College Administrative Rule No. 6Hx10-1.006, 1.008; Lake City Community College Board Policy No. 6Hx12:10-09; Lake-Sumter Community College Rule No. 1.38; Manatee Community College Rule No. 679; Miami-Dade Community College, Rule Nos. II-86, II-86A; North Florida Junior College, GENERAL CATALOG, *Drug Policy*, p. 53; Okaloosa-Walton Community College Policy No. 6Hx17-5.021; Palm Beach Community College, Board of Trustees Rule No. 6Hx-18-5.44; Pasco-Hernando Community College, GENERAL CATALOG, *Drug-Free College Program*, p. 39; Pensacola Junior College FACULTY/STAFF HANDBOOK, pp. 44-48; Polk Community College Rule No. 2.25; St. John's River Community College, "Policy Statement on Alcohol and Drug-Free Workplace;" St. Petersburg Junior College, FACULTY AND STAFF HANDBOOK; Santa Fe Community College, Rule No. 3.36; Seminole Community College, Policy No. 2.100; South Florida Community College, Policy No. 4.46, Procedure No. 4460; Tallahassee Community College, "Policy on Controlled Substances and Alcohol;" Valencia Community College, Policy and Procedure No. 6Hx28:04-41.

respect to compliance with the requirements of the federal Drug-Free Workplace Act of 1988³⁹ and the Drug-Free Schools and Communities Act Amendments of 1989.⁴⁰ Moreover, each policy was examined in respect to whether it featured an employee drug testing component.

Policies and related literature ranged in scope from detailed, multiple-page narratives to statements as short as three paragraphs. Generally, Florida's community colleges' policies reflect compliance with the aforementioned federal laws. Some exceptions were noted.

In respect to the Drug-Free Workplace Act of 1988, most policies reflected, if only implicitly, compliance in regard to the following criteria:

- (1) that the institution certify it is a drug-free workplace;⁴¹ and
- (2) that the institution publish a statement pronouncing itself as a drug-free workplace.⁴²

Twenty-four of the twenty-eight respondents made some reference in policy to the establishment of a drug awareness program. One policy was unclear in that regard. In terms of the requirement that employees notify the institution in the event of a drug-related conviction within five days, twenty-

³⁹ 41 U.S.C. §§ 701-707 (Supp. 1991).

⁴⁰ 20 U.S.C. § 3224 (a) (1989).

⁴¹ 41 U.S.C. § 701(a)(1).

⁴² *Id.* at 701(a)(1)(A).

one of twenty-eight policies clearly stated that requirement. The requirement that the institution notify employees of sanctions that can be levied in the event of illicit drug activity was evidenced in all twenty-eight policies. Institutions are also required to pledge that a good faith effort is ongoing to be in compliance with federal requirements; such was clearly indicated in nineteen policies. The requirement the institution notify the federal government within ten days of any illicit on-duty drug conviction was the least evident. That requirement was represented in only nine of the colleges' policies.

Relative to the Drug-Free Schools and Communities Act Amendments of 1989, policies furnished by Florida community officials indicated general compliance with most requirements of the Act. The requirement that colleges educate employees as to health risks related to illicit drug use was least evidenced. Ten policies did not clearly reference that requirement. The Act also requires that colleges educate employees as to available counseling and rehabilitative services. Three policies did not clearly address that requirement. Only ten of the policies indicated the employee is required to sign a drug-free statement, while two of the policies indicate students must sign such a statement.

Florida Community College Drug Screening Programs

Seven of the twenty-eight policies collected by the researcher contained provisions for employee drug testing. One of those college's policies until recently contained a provision for student drug testing. The student drug screening program was being conducted on a random basis, but, based on a recent U.S. Supreme Court decision, the policy has been suspended pending further review by college officials.⁴³

There was sharp contrast among the seven policies as to the extent to which the drug screening programs were explained. At one extreme, three college policies contained detailed information as to drug screening procedures and guidelines. On the other extreme, drug screening was alluded to only as a component of possible disciplinary actions.

Three of the policies contain provisions for job applicant, reasonable suspicion, follow-up to rehabilitation programs, and post-accident drug testing. Two provide for testing only for job finalists and on the basis of reasonable suspicion. Another references testing only as it applies to persons on probation for a first-time illicit drug offense. Yet another provides for drug screening only on the basis of reasonable suspicion.

⁴³ See, *Derdeyn v. University of Colorado*, 114 S.Ct. 1646 (1994).

Commonalities in Drug Screening Programs

The common thread among most of the policies is that testing of currently employed persons is based, in all or part, on reasonable suspicion. Some policies define reasonable suspicion directly in accordance with the Florida Statutes (ch. 112.0455), while other reference "reasonable suspicion" without explicitly defining the term.

Another area of sharp contrast is in the policies' guidelines for job applicant drug screening. Three policies provide for the testing of all job finalists, irrespective of the specific duties required. One policy provides for drug screening of job finalists only in the cases of safety-sensitive or special risk positions. Another policy is unique in that it provides for testing job finalists for certain safety-sensitive positions and others as defined by the college president. Those policies which provide for testing all job finalists indicate that the college officials recognize Chapter 440.102 of the Florida Statutes as the proper legal authority. Whereas, the policy that provides for testing only job finalists in safety-sensitive or special risk positions indicates college officials recognize Chapter 112.0455 as the proper legal authority. The basic difference in the two statutes is that the former applies to the private sector, while the latter applies to public employers.

Issues Florida Community Colleges
Could Face in Conducting Employee Drug Testing

Florida community college administrators and governing board members representing institutions which engage in employee drug testing must be concerned with common law challenges to those programs. Judicial response, considering the outcomes of employee drug testing cases in recent years, is only somewhat predictable. However, the premises of prospective employee challenges, based on case law history, is predictable. Challenges could include

(1) Coercion--The Florida case of *Underhill v. Publix*⁴⁴ demonstrates that consent may be a weak justification for employee drug testing, depending on the consequences of refusal to sign a consent form. If the consequence is termination, it is possible, if not predictable, that the courts will view such a scenario as coercion, not consent. It could be argued that termination based on refusal to sign a consent form constitutes depriving an employee of a benefit.

*Iowa v. Stanford*⁴⁵ demonstrates that the circumstances existing at the time consent is given determine the issue of voluntariness. In *Iowa*, the plaintiff refused to submit to a blood test after being charged with driving while intoxicated. The plaintiff did, however, consent to

⁴⁴ *Underhill*, 610 So.2d 48.

⁴⁵ *Iowa v. Stanford*, 474 N.W.2d 573 (1991).

urinalysis. He was subsequently unable to urinate, and was informed by a nurse that he might have to be catheterized. The district court suppressed the evidence, concluding that the nurse's statement, though inadvertent, constituted coercion. The Iowa Supreme Court reversed, ruling that the issue was whether the plaintiff felt coerced at the time he consented, not at the time he attempted to provide the sample.

(2) Defamation--Florida community college officials may risk a defamation action by inaccurately interpreting a drug test. In *Houston Belt & Terminal Railway v. Wherry*,⁴⁶ an employee was fired based on the erroneous results of a drug test administered after he had fainted on the job. The firm's internal accident report as well as a letter sent to the Department of Labor stated that the employee's urinalysis test was positive. The employee sued and was awarded \$200,000 for defamation, \$150,000 in compensatory damages and \$50,000 in punitive damages. In *O'Brien v. Papa Gino's of America, Inc.*,⁴⁷ an employee who was forced to take a polygraph test and falsely accused of cocaine use by his employer was awarded \$450,000. The polygraph test was

⁴⁶ *Houston Belt & Terminal v. Wherry*, 548 S.W.2d 743 (Tex. Civ. App. 1976), *cert. denied*, 434 U.S. 962 (1977). See also Betty Southard Murphy, *How to Protect Employees Who Are Tested for Drug and Alcohol Abuse*, 33 PRAC. LAW. 27, 35 (1988).

⁴⁷ *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067 (1st Cir. 1986).

ruled an invasion of privacy and the false accusation of drug use, defamation.

Defamation requires false and defamatory words about the plaintiff, communicated to a third party, that result in harm to the reputation of the plaintiff.⁴⁸ In workplace defamation suits, employers usually assert that any communication was qualifiedly privileged.⁴⁹ Qualified privilege can be defined as

a communication is qualifiedly privileged is it is made on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty. The essential elements of a qualifiedly privileged communication are good faith, an interest to be upheld, a statement limited in its scope to the upholding of such an interest and publication in a proper manner only to proper parties.⁵⁰

Where a statement is made in a situation in which there is qualified privilege, the injured party has the burden of proving not only that the statements were false, but also that the statements were made with actual malice.⁵¹ Although the burden of proof rests with the employee, it is incumbent

⁴⁸ *Batt v. Globe Engineering Co.*, 13 Kan. App.2d 500, 504, 774 P.2d 1371, 1375 (1989); *Luttrell v. United Telephone Systems, Inc.*, 9 Kan.App.2d 620, 621, 683 P.2d 1292, 1293 (1984), *aff'd* 236 Kan. 710, 695 P.2d 1279 (1985).

⁴⁹ See, e.g., *Merritt v. Detroit Memorial Hospital*, 81 Mich.App. 279, 265 N.W.2d 124 (1978).

⁵⁰ *Luttrell v. United Telephone Systems, Inc.*, 9 Kan.App.2d at 622, 683 P.2d at 1294.

⁵¹ *Turner v. Halliburton Co.*, 240 Kan. 1, 10, 722 P.2d 1106, 1114 (1986).

upon Florida community college officials to handle any information/evidence obtained from an employee drug test with appropriate confidentiality and care.

(3) Invasion of Privacy--In challenging a drug screening program, it is predictable that a Florida community college employee would claim his or her Fourth Amendment rights had been violated. Such a position supposes that Florida community college officials are state actors and that a drug screening program constitutes an unreasonable search action.

If Florida's community college officials are indeed state actors, then it is clear that community college employees who are tested for illicit drug use are protected by the Fourth Amendment against unreasonable search and seizure actions.⁵² There is some contention that Florida community college employees are not state employees. For instance, on October 15, 1976, an opinion issued by the Office of the General Counsel for the Florida Department of Education stated that community colleges are not state agencies, rather "special purpose districts."⁵³

⁵² The U.S. Constitution's Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing a place to be searched, and the persons or the things to be seized."

⁵³ This opinion, based on Board of Public Instruction v. State Treasurer, 231 So.2d 1, appears on page 37 of the DEPARTMENT OF EDUCATION GENERAL COUNSEL OPINIONS DIRECTED TO COMMUNITY COLLEGES (1974-1993), VOLUME I.

Subsequently, Sydney H. McKenzie III, then General Counsel for the Department of Education, and/or his associate, Cecilia Bradley, issued three opinions also refuting the concept that Florida public community colleges are state agencies. Those opinions are dated June 26, 1987;⁵⁴ June 30, 1987;⁵⁵ and November 6, 1989,⁵⁶ the latter of which reads, in part

Chapter 112.0455(5)(h), Florida Statutes defines "employer" as "any agency within state government that employs individuals for salary, wages, or other remuneration." Chapter 20.055, Florida Statutes, defines "state agency" to mean the following: "Each department created pursuant to Chapter 20, and also includes the Executive Office of the governor, the Department of Military Affairs, the Parole and Probate Commission, the Board of Regents, the Game and Fresh

⁵⁴ On June 26, 1987, Cecilia Bradley, counsel for the Florida Department of Education, wrote an office memorandum to General Counsel Sydney H. McKenzie III, which stated, "Chapter 287 of the Florida Statutes is inapplicable to community colleges..." The memorandum appears on page 289 in the DEPARTMENT OF EDUCATION GENERAL COUNSEL OPINIONS DIRECTED TO COMMUNITY COLLEGES (1974-1993), VOLUME II.

⁵⁵ On June 30, 1987 Cecilia Bradley, counsel for the Florida Department of Education, wrote a letter to Carol N. Davis of Leesburg, Florida, addressing the issue of whether Florida's community colleges were state agencies as defined by Chapter 287 of the Florida Statutes. In the letter, Counselor Bradley wrote, "Chapter 287 does not apply to the community colleges because of the definition of an agency in Section 287.012." This letter appears on pages 293-94 in the DEPARTMENT OF EDUCATION GENERAL COUNSEL OPINIONS DIRECTED TO COMMUNITY COLLEGES (1974-1993), VOLUME II.

⁵⁶ On November 6, 1989, Florida Department of Education General Counsel Sydney H. McKenzie III wrote a letter to Steven Robbins, general counsel for Florida Community College at Jacksonville, stating, "Community colleges are not state agencies..." This letter appears on pages 391-392 of the DEPARTMENT OF EDUCATION GENERAL COUNSEL OPINIONS DIRECTED TO COMMUNITY COLLEGES (1974-1993), VOLUME II.

Water Fish Commission, and the state court system." This limits the definition of state agencies to those departments created in Chapter 20 and those agencies listed. Community Colleges are not state agencies according to this definition.⁵⁷

Contrasting such opinions is the criteria on state action offered in William A. Kaplin's *The Law of Higher Education*.⁵⁸ Given that criteria, it would be difficult, if not impossible, to make a valid argument against Florida's public community colleges being state actors. Kaplin notes the courts have established that if a private entity (1) acts as an agent of government in performing a particular task delegated to it by government; or (2) performs a function that is generally considered the responsibility of government; or (3) obtains substantial resources, prestige, or encouragement from its contracts with government, its actions may be considered state action and subject to constitutional constraints.⁵⁹ On the basis of analyzing provisions of the Florida community college system in the Florida Statutes alone, irrespective of other considerations such as the colleges' receiving significant appropriations from the federal government for student aid, it is arguable that Florida's public community colleges are state actors.⁶⁰

⁵⁷ *Id.*

⁵⁸ WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION: COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, SECOND EDITION (1989).

⁵⁹ *Id.* at 18.

⁶⁰ This conclusion will be discussed more thoroughly in the "Synthesis/Conclusions" section of this chapter.

In addition to citing Fourth Amendment privacy guarantees, an employee might also point to the Restatement (Second) of Torts⁶¹ to support their claim. The Restatement stipulates that

one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.⁶²

Given the language of the Restatement (Second) of Torts regarding invasion of privacy, prudence dictates that Florida community college governing board members and administrators consider the reasonableness of the search and the legitimacy of the need for same in evaluating institutional policies.

(4) Wrongful Discharge--A Pennsylvania case illustrates that an employee fired for refusal to submit to drug testing may sue for wrongful discharge. In *Borse v. Piece Goods Shop, Inc.*,⁶³ the plaintiff challenged her termination on the basis that it violated public policy law. The court held that her discharge could meet the public policy exception in

⁶¹ THE RESTATEMENT (SECOND) OF TORTS is a publication of the American Law Institute, Washington, D.C., copyright © 1965-1989. THE RESTATEMENT OF THE LAW, SECOND, 2D is "widely considered to be the most authoritative text on the state of the law." See W.L. 1994 DER 96 d16. Lawyers cite to the RESTATEMENT in making legal arguments.

⁶² *Id.*

⁶³ *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992).

the state's tortuous invasion of privacy law under certain circumstances. A similar ruling was made in *Twigg v. Hercules Corp.*,⁶⁴ a West Virginia case in which the plaintiff successfully challenged a drug testing policy not based on reasonable suspicion.

However, other decisions in cases involving a wrongful discharge claim have favored employers, such as *Hennessey v. Coastal Eagle Point Oil Co.*,⁶⁵ *Groves v. Goodyear Tire and Rubber Co.*,⁶⁶ and *Rothwell v. Wetterau*.⁶⁷

(5) *Illegal Search and Seizure*--It is conceivable that a Florida community college employee subjected to drug testing could challenge college officials on the basis of a Section 1983 action.⁶⁸ A Section 1983 challenge may provide both injunctive relief and compensatory damages to a college

⁶⁴ *Twigg v. Hercules*, 185 W.Va. 155, 406 S.E.2d 52, 56 (1990).

⁶⁵ *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992).

⁶⁶ *Groves v. Goodyear Tire & Rubber, Co.*, 591 N.E.2d 875 (Ohio App. 1991).

⁶⁷ *Rothwell v. Wetterau, Inc.*, 820 S.W.2d 557 (Mo.App. 1991).

⁶⁸ 42 U.S.C. § 1983 (1988) is a statute which creates a Fourteenth Amendment damages action. This statute provides: Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for the redress.

employee who is the subject of an unlawful search. Injunctive relief, however, is only appropriate when there is a clear pattern of conduct by school officials that violates employees' Fourth Amendment rights on an ongoing or repeated basis.⁶⁹ An action for compensatory damages is normally the result of an isolated instance.⁷⁰ If an employee's Fourth Amendment rights are violated recklessly and with deliberate indifference, the employer could be held liable for punitive damages.⁷¹ Finally, under 18 U.S.C. § 242⁷² (the criminal counterpart to Section 1983), an employer who willfully violates an employee's Fourth Amendment rights can be criminally prosecuted.⁷³

It is important to note that a Section 1983 action cannot be brought against a state agency,⁷⁴ i.e., the Florida Department of Education, but officials of such

⁶⁹ See *Rizzo v. Goode*, 423 U.S. 362 (1976); *Allee v. Medrano* 416 U.S. 802 (1974).

⁷⁰ *Bivens v. Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁷¹ *Smith v. Wade*, 461 U.S. 30 (1983).

⁷² 18 U.S.C. § 242 (1988) is a statute which provides: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects an inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ...shall be fined not more than \$1,000 or imprisoned not more than one year, or both....

⁷³ *Id.*

⁷⁴ *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

agencies in their individual capacities are subject to a Section 1983 claim.⁷⁵ A Section 1983 suit is actionable even in states that have not abrogated the doctrine of sovereign immunity.⁷⁶

Given the aforementioned provisions of Section 1983, it could be argued that if a Florida community college drug testing program is deemed a violation of an employee's Fourth Amendment rights, college officials could be subject to a Section 1983 action in their individual capacities up to and including compensatory, punitive damages, and criminal prosecution. In addition, an ongoing employee drug testing program, if successfully challenged, would arguably meet the criteria of repeated Fourth Amendment violations for injunctive relief.

Justifications for Florida Community Colleges to Drug Test

Just as the common law presents impediments to employee drug testing, so does it offer incentives for employers to conduct urinalysis programs. Florida community college officials who have implemented or desire to implement an employee drug testing program may be faced with legal challenges. Therefore, college officials must be prepared to defend their drug screening programs. The following are

⁷⁵ *Id.* at 61.

⁷⁶ *Howlett v. Rose*, 496 U.S. 356 (1990).

rationales/justifications for employee drug testing programs commonly cited in the literature.

Respondeat Superior

According to the doctrine *respondeat superior*, an employer may be held responsible for the wrongful actions of his or her employees. Under this doctrine, the master is liable for injury to person or property of another proximately resulting from acts of employee done within the scope of his or her employment in the employer's service. However, the doctrine applies only when a relation of master and servant existed between the defendant and wrongdoer at the time the injury occurred. As an example, in *Burger Chef Systems, Inc., v. Govro*,⁷⁷ the plaintiff was struck by an automobile driven by the defendant's employee when the driver was on an errand (to the bank) for the employer. Judgment was rendered for the plaintiff in the U.S. District Court for the Eastern District of Missouri and affirmed by the Eighth Circuit upon appeal.

In *Otis Engineering Corporation v. Clark*,⁷⁸ the Texas Supreme Court held that the husbands of two women killed by an employee who had been sent home for being intoxicated could bring a wrongful death action against the employer for violating its duty "to prevent the employee from causing an

⁷⁷ *Burger Chef Systems, Inc., v. Govro*, 407 F.2d 921 (1969).

⁷⁸ *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983).

unreasonable risk of harm to others."⁷⁹ In *Brockett v. Kitchen Boyd Motor Company*,⁸⁰ the California Court of Appeals permitted a suit against an employer by a plaintiff injured in an automobile accident caused by an intoxicated employee on the way home after an office Christmas party. The *Otis* and *Brockett* cases represent a form of *respondeat superior* known as negligent entrustment.⁸¹

In addition to failing to foresee the dangers presented by a drug impaired employee, an employer can also be held liable for hiring a person who is currently under the influence of drugs. In *Pittard v. Four Seasons Motor Inn*,⁸² a New Mexico hotel was found liable for damages suffered when a child who was sexually assaulted on the hotel premises by an on-duty employee. The court found that the hotel knew of the employee's drug addiction and tendency toward violent behavior before the assault occurred.⁸³ The *Pittard* case involves a form of *respondeat superior* termed negligent hiring.⁸⁴

⁷⁹ *Id.* at 311.

⁸⁰ *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App.2d 69, Cal.Rptr. 136 (1968).

⁸¹ Betty S. Murphy, *How to Protect Employees Who Are Testing for Drug and Alcohol Abuse*, 33 PRAC. LAW. 27, 36 (1987).

⁸² *Pittard v. Four Seasons Motor Inn*, 101 N.M. 723, 688 P.2d 333 (1984).

⁸³ *Id.* 101 N.M. at 731, 688 P.2d at 341.

⁸⁴ Murphy, *supra* note 82, at 37.

Statutory Authorization

Perhaps one of the strongest justifications Florida community college officials might employ in defending a challenge of a drug testing program is that the Florida Statutes authorize such programs. Authorizations for drug testing can be found in Chapter 112.0455, entitled "Florida Drug-Free Workplace Act" or Chapter 440.101, which outlines the Florida Drug-Free Workplace program requirements. To be clear, the Florida Statutes authorize employee drug testing, but do not mandate it. The issue of state action is central in determining which statute, Chapter 112.0455 or Chapter 440.101, is applicable to Florida community colleges. If a Florida community college official were to take the position that his or her institution is a state agency, then the argument could be made that authorization to drug test is founded in Chapter 112.0455. Conversely, if a Florida community college official were to take the position that his or her institution is not a state actor, then the argument could be made that authorization is established in Chapter 440.101.

The essential difference in Chapters 112.0455 and 440.101 has to do with the testing of job applicants. Under the former, an agency is authorized to test job applicants for safety-sensitive positions only. Under the latter, an agency is authorized to test all finalists for any position, irrespective of whether the applicant's job is classified as

safety-sensitive or not. Both statutes have provisions for the testing of current employees on the basis of reasonable suspicion and in the event of a job-related accident.

In Chapter 112.0455, the language is clear that the public employer has "no legal duty to test." Section 4 reads

all drug testing conducted by employers shall be in conformity with the standards established in this section and all applicable rules promulgated pursuant to this section. However, employers shall not have a legal duty under this section to request an employee or job applicant to undergo drug testing. No testing of employees shall take effect until local drug abuse assistance programs have been identified.

The term "job applicant" is identified as "a person who has applied for a special risk or safety-sensitive position with an employer and has been offered employment upon successfully passing a drug test. "Safety-sensitive" is defined as "any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety."⁸⁵

In Chapter 440.102, which is part of Florida's laws pertaining to workers' compensation, there is no reference to "safety-sensitive" in the definition of job applicant. Otherwise, the types of drug tests provided for are the same as in Chapter 112. Types of testing are job applicant,

⁸⁵ FLA. STAT. ch. 112.0455 (1993).

reasonable suspicion, routine fitness for duty, and follow-up.

Educational Malpractice

Closely linked to the doctrine of *respondeat superior* may be educational malpractice. Malpractice has been defined as

a dereliction from professional duty or failure to exercise an accepted degree of professional skill or learning by one rendering professional services which result in injury, loss or damage. Also, an injurious, negligent, or improper practice.⁸⁶

Florida community college officials may cite their duty to ensure quality instruction and appropriate conduct by employees as a justification for implementing a drug testing program. The researcher failed to identify any cases in which a constituent sued a school system on the basis of the school's delivery systems being substandard due to illicit drug use by employees. However, it is logical that both the public and school officials have a right to expect appropriate conduct and quality performance by employees. In the absence of such, terminations, even in the case of employees under continuing contract (tenure), have resulted.⁸⁷ In the Florida case of *Dileo v. School Board of*

⁸⁶ Joe Mills, *Teachers: Malpractice*, 16 SCH. L. NEWSLETTER 695 (1991).

⁸⁷ See, e.g., *Elvin v. City of Waterville*, 573 A.2d 381 (1990); *Ferris v. Turlington*, 510 So.2d 292 (1987); *Sauter v. Mt. Vernon School District No. 320*, 58 Wash.App. 121, 791 P.2d 549 (1990); *Unified Sch. Dist. No. 434 v. Hubbard*, 868 P.2d 1240 (Kan. Ct. App. 1994); *Baldrige v. Board of Trustees*, 870 P.2d 711 (Mont. 1994).

Dade County,⁸⁸ a teacher terminated for misconduct and gross insubordination sued the school district and did not prevail, as the court held that a preponderance of the evidence, rather than clear and convincing evidence, represented the quantum of proof necessary to support a teacher's dismissal. In *Elvin v. City of Waterville*,⁸⁹ an elementary school teacher fired for maintaining a sexual relationship with a high school student sued the city. The Supreme Court of Maine found that evidence supported the city's claim that the plaintiff was unfit to teach and that her continued services were unprofitable for the school system. In *Sauter v. Mount Vernon School District*,⁹⁰ a teacher terminated for having a sexual relationship with a student lost his case upon appeal. The appeals court found that the plaintiff's conduct was sexually exploitative of the student and directly related to plaintiff's conduct as a teacher, therefore, sufficient to warrant his discharge.

In *Elvin* and *Sauter*, school employees lost their jobs because it was determined that they engaged in immoral sexual conduct. This study begs the questions: Is illicit drug use any less immoral than inappropriate sexual behavior? If not, then do Florida community college

⁸⁸ *Dileo v. School Board of Dade County*, 569 So.2d 883 (1990).

⁸⁹ *Elvin*, 573 A.2d 381.

⁹⁰ *Sauter*, 58 Wash.App. 121, 791 P.2d 549.

officials have a duty to prevent or, at a minimum, discourage drug use by employees through urinalysis programs? In examining the stated missions of Florida's public community colleges,⁹¹ most make some reference to a commitment to quality education. It could be argued that where illicit drug use exists, quality education cannot. Therefore, to further their commitment to quality and, thus, avoid the potential of an educational malpractice action, Florida community college officials may argue that employee drug testing is justified.

Workers' Compensation

Florida public community colleges which have established an employee drug testing program could realize some financial benefit in terms of the funds paid in workers' compensation insurance claims. Twenty-seven of Florida's twenty-eight community colleges are members of the Florida Community College Risk Management Consortium.⁹² Since 1980, all of the members of the consortium have been self-insured up to the first \$300,000 in liability coverage, meaning the institutions are not paying what is termed "first-dollar" premiums.⁹³ Brenda Diaz, assistant director

⁹¹ In the course of this study, the researcher examined mission statements published in the catalogs of several Florida community colleges.

⁹² Telephone Interview with Brenda Diaz, Assistant Director of the Florida Community Colleges Risk Management Consortium (June 13, 1994). Florida Community College at Jacksonville is not a member of the consortium.

⁹³ *Id.*

of the consortium, explained how Florida community colleges that establish a drug testing program could save money:

There is a high probability that colleges which drug test employees will experience a reduced number of claims. The savings won't be realized in the first year a drug testing programs implemented, but it is predictable that a significant savings in claim dollars will be seen over a period of years.⁹⁴

The consortium has no provision for a college with a drug testing program to be awarded an automatic minimum percentage reduction in its premiums because the colleges, as previously stated, are self-insured up to \$300,000. Diaz stated the likelihood for a claim to exceed that amount, based on a past history of activity in the consortium, is "remote."⁹⁵

Chapter 627.0915 of the Florida Statutes, entitled "Rate Filings; Workers' Compensation and Drug-Free Workplace," stipulates that the Florida Department of Insurance will approve a rating plan for workers' compensation insurance that gives specific identifiable consideration in the setting of rates to employers who either implement a drug-free workplace program pursuant to rules adopted by the Department of Labor and Employment Security or implement a safety program approved by the Division of Safety pursuant to rules adopted by the Division

⁹⁴ *Id.*

⁹⁵ *Id.*

of Safety of the Department of Labor and Employment Security or implement a drug-free workplace program and a safety program. The statute reads, "The plan must take effect January 1, 1994, must be actuarially sound, and must state the savings anticipated from such drug testing and safety programs."⁹⁶ However, Florida community colleges are not impacted by the statute because of the aforementioned self-insured status.

History of Drug Abuse

Nothing is written in any of the substance abuse policies of Florida's public community colleges that suggests a history of illicit drug use associated with the respective institutions. However, it has been established in *Skinner* and *Von Raab* that a history of drug abuse within a given organization is a key factor in determining whether government has a compelling enough interest to conduct drug testing programs. It is, therefore, logical that Florida community college officials, if faced with a challenge of an employee drug testing program, would have to argue a history of drug abuse in a broader context.

The following are some recently published facts that suggest Florida has significant substance abuse problems:

- (1) Florida's prison population has doubled since 1983, and drug use is a major reason behind that increase - particularly the use of crack

⁹⁶ FLA. STAT. ch. 627.0915 (1993).

cocaine, according to Harry Singleton, Secretary of the Florida Department of Corrections.⁹⁷

- (2) Some 75,729 drug arrests were made in Florida in 1993, according to the Florida Department of Law Enforcement.⁹⁸
- (3) A recent poll conducted for the Voice of Florida project revealed that 60 percent of the state's residents believe drug abuse and related problems are critical issues facing the state.⁹⁹
- (4) Some 26,386 Floridians entered treatment centers in 1993 for drug addiction problems, particularly marijuana and cocaine use, according to the Department of Health and Rehabilitative Services (HRS).¹⁰⁰
- (5) According to the Federal Drug Enforcement Administration, some 50 percent of all the cocaine entering the United States each year comes through Florida.¹⁰¹

⁹⁷ David Cox, *Bill for Drug Indulgence Comes Due*, MIAMI HERALD, June 17, 1994 at A1, A14.

⁹⁸ *Id.* at A14.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

- (6) Florida high school students responding to a recent poll said they have had someone either offer, sell, or give them illegal drugs on school property accordingly: ninth graders (27 percent); tenth graders (25 percent); eleventh graders (25 percent); and twelfth graders (20 percent).¹⁰²

Institutional Integrity

Promoting and preserving institutional integrity is a rationale for drug testing that has been cited in the literature¹⁰³ and has been employed in case law for some time.¹⁰⁴ One author wrote:

Colleges and universities must protect their reputations. In order to attract quality students, colleges and universities must prevent drug abuse among their instructors. A drug-free climate is essential to fostering good relations with the parents of students. Parents would be less likely to send their child or pay tuition to an institution with a reputation for drug abuse by its instructors.¹⁰⁵

102 *Id.*

103 James R. Stadler, *Drug Testing of College and University Employees*, 15 J.C. & U.L. 321, 322 (1989); Michael A. Mass, *Public Sector Drug Testing: A Balancing Approach and the Search for a New Equilibrium*, 42 BAYLOR L. REV. 249 (1990); J. Devereux Weeks, *Public Employee Drug Testing Under the Fourth Amendment After Skinner and Von Raab*, 24 URB. LAW. 515 (1992).

104 *See, e.g., Von Raab*, 489 U.S. at 670.

105 Stadler, *supra* note 104, at 322.

Similarly, in evaluating the National Collegiate Athletic Association's (NCAA) drug testing program, integrity has been cited as a major justification for the program.

Facially, the purpose of the NCAA program is two-pronged: first, to protect the health and safety of the student-athlete; and, second, to protect the public interest in the integrity of intercollegiate championships.¹⁰⁶

The institutional integrity rationale when balanced against individual privacy rights, however, has been viewed as a weak stand-alone justification by the courts. In *Von Raab*, the U.S. Supreme Court accepted work force integrity as one of the U.S. Customs Service's compelling interests to drug test its employees. However, the Court's acceptance of the integrity rationale was directly linked to the government's interest represented by the specific duties of customs agents, i.e., to protect the nation's borders and handle sensitive materials. In lower court cases, defendants have attempted unsuccessfully to use the *Von Raab* integrity rationale to justify drug testing programs.

As an example, in *Georgia Association of Educators v. Harris*,¹⁰⁷ the court made a strong statement against the institutional integrity rationale where public education is

¹⁰⁶ C. Claude Teagarden, *Suspicionless Punitive Urinalysis Testing of College and University Student-Athletes*, EDUC. LAW. RPTR. 1007 (1991).

¹⁰⁷ *Georgia Ass'n of Educators v. Harris*, 749 F.Supp. 1110 (1990).

concerned. The U.S. District Court, Northern District of Georgia, ruled that the state's generalized interest in integrity of the work force was insufficient to outweigh job applicants' Fourth Amendment rights. The court termed the defendant's position "untenable" because neither *Von Raab* nor its progeny recognize such a "generalized interest" as sufficiently compelling to outweigh an individual Fourth Amendment rights.¹⁰⁸ Similar arguments for work force integrity have been made and rejected in *Harmon v. Thornburgh*¹⁰⁹ and *Taylor v. O'Grady*.¹¹⁰

In *Bally v. Northeastern University*,¹¹¹ the defendant cited its interest in "ensuring that student-athletes, as role models to other students and as representatives of Northeastern to the public, are not perceived as drug users."¹¹² The court upheld the constitutionality of Northeastern's drug testing program because the university is a private entity. However, it has been argued that the plaintiff in *Bally* would have prevailed had the institution been a public entity.¹¹³

¹⁰⁸ *Id.* at 1114.

¹⁰⁹ *Harmon*, 878 F.2d 484.

¹¹⁰ *Taylor*, 888 F.2d at 1189.

¹¹¹ *Bally v. Northeastern University*, 403 Mass. 713, 532 N.E.2d 49 (1989).

¹¹² *Id.*

¹¹³ *Teagarden*, *supra* note 107, at 1006.

Based on the aforementioned lower court rulings, it could be argued that the rationale of institutional integrity would represent a weak defense for a challenged Florida community college employee drug testing program.

Federal Mandate

Perhaps the least debatable justification for Florida community college officials to drug test certain employees is that they are compelled to do so by the U.S. Department of Transportation's Omnibus Transportation Employee Testing Act of 1991.¹¹⁴ (See Appendix G.) The final rules implementing the Act were not issued until February 15, 1994. Effective dates are January 1, 1995, for colleges and universities with fifty or more covered employees as of March 17, 1994; and January 1, 1996, for colleges and universities with less than fifty covered employees as of March 17, 1995.¹¹⁵

Under the rules, each applicant for employment or employee who is required to obtain a commercial driver's license (CDL) at a college or university must be tested for drugs, alcohol, or controlled substances. Specifically, colleges and universities are required to conduct pre-employment/pre-duty, reasonable suspicion, random, and post-accident alcohol and controlled substances testing of each applicant for employment or employee who is required to

¹¹⁴ 59 Fed. Reg. 7353 (February 15, 1994).

¹¹⁵ *Id.*

obtain a CDL. An employee covered by the rules of the Act is prohibited from refusing to submit to testing. Institutions are also required to impose penalties on employees with undesirable test results, comply with new reporting and record keeping rules, and provide for appropriate staff training and assistance programs.¹¹⁶

With the exception of certain state criminal laws, the Act pre-empts inconsistent state and local laws. In particular, the Act requires that colleges and universities take appropriate measures to ensure that institutional employment practices and policies (1) conform with federal rules governing privacy collection techniques; (2) incorporate the Department of Health and Human Services' mandatory guidelines for controlled substances testing and comparable safeguards for alcohol testing; (3) require that confirmation of any initial positive test is quantified; (4) require collection of split urine specimens; (5) guarantee confidentiality of test results; and (6) provide for a scientifically random selection of employees to be tested.¹¹⁷

Louise Caldwell, Program Director for the Florida Department of Education's Schools Transportation Operations Division, commented on the Act:

There is absolutely no question that if a Florida community college employee is assigned the duty of driving a vehicle weighing in excess of 26,000 pounds and

¹¹⁶ *Id.*

¹¹⁷ *Id.*

transports sixteen or more passengers, that employee must hold a commercial drivers license and will be subject to drug testing. This is a new policy that will undoubtedly be challenged, but for the last seven years the Department of Transportation's drug testing regulations have withstood legal challenges time and time again.¹¹⁸

National Association of College and University Business Officers (NACUBO) officials agree with Caldwell's position. In an April 19, 1994 statement, NACUBO reported, "Under the new DOT rules, every college and university will be required to conduct pre-employment/pre-duty, reasonable suspicion, random, and post-accident alcohol and controlled substances testing of each applicant for employment or employee who is required to obtain a CDL."¹¹⁹

Lost Productivity

Florida community college officials whose institutions have established employee drug testing programs may cite lost productivity as a rationale for urinalysis. Much like the rationale of workplace drug history, this rationale would also have to be employed in a broad context, as there is little empirical research to support the many claims that have been made correlating illicit drug use with excessive absenteeism, accidents, injuries, and other health-related

¹¹⁸ Telephone Interview with Louise Caldwell, Program Director of the Florida Department of Education Schools Transportation Operations Division (June 14, 1994). See also *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991).

¹¹⁹ Katherine H. Gustafson, *Employee Alcohol and Controlled Substances Testing Rules Issued by Department of Transportation*, NACUBO ADVISORY REP. 1 (April 19, 1994).

productivity losses.¹²⁰ However, some studies are being conducted that suggest such a correlation exists.

As an example, an ongoing study by the U.S. Postal Service has inferred a definite relationship between recent drug use (as determined by pre-employment drug testing) and job performance indicators.¹²¹ Of 4,005 new postal hires, 395 or 9 percent tested positive for illicit drug use. After one year on the job, those workers were found to be absent at a rate 59 percent greater than the new hires who tested negative. Rates of involuntary turnover, i.e., terminations, were 47 percent higher in the positive group.¹²²

Another study conducted by Georgia Power Company attempted to discern the relationship between drug abuse and various measures of workplace performance. The records of employees who were referred to an employee assistance program or entered a treatment center for drug abuse were compared to the work records of a group of matched controls for the year prior to referral or treatment. Abusers were found to have consumed almost twice the medical benefits as controls (\$1,347 versus \$678); to have been absent 1.5 times as often (91 hours per year versus 60 hours per year); and to have made over twice the number of workers' compensation claims (.11 per employee per year versus .05).¹²³

¹²⁰ NATIONAL INSTITUTE ON DRUG ABUSE, CAPSULES 2, (June 1990).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

The National Institute on Drug Abuse (NIDA) estimates that of current illicit drug users in the United States, 70 percent are employed either full- or part-time,¹²⁴ and 12 percent are students.¹²⁵ Further, the NIDA estimated that there are over 10 million employed persons in America who are current illicit drug users. Among full-time employees, the NIDA study suggested that 24 percent of males aged eighteen through twenty-five are drug users,¹²⁶ as are 15 percent of those between the ages of twenty-six and thirty-four.¹²⁷

According to a 1994 report in the Federal Registry, drug and alcohol abuse is estimated to cost employers more than \$100 billion annually.¹²⁸ That figure contrasts a lesser amount cited in a 1987 study by the Research Triangle Institute (RTI). RTI estimated that illicit drug use costs American businesses \$60 billion a year in loss of productivity, absenteeism, accidents, employee theft, and health care costs.¹²⁹

124 STEVEN W. GUST, DENNIS J. CROUCH, AND J. MICHAEL WALSH, *DRUGS IN THE WORKPLACE: RESEARCH AND EVALUATION DATA 3* (1990), VOLUME II.

125 NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 121, at 1.

126 GUST, *supra* note 125, at 4.

127 NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 121, at 1.

128 WILLIAM D. TURKULA, *DRUG AND ALCOHOL TESTING: ADVISING THE EMPLOYER* 1-2 (1994).

129 Madeline Drexler, *Employee Drug-Testing Enters Mainstream*, DES MOINES REGISTER, May 27, 1990, at 1C.

Diminished Privacy Rights

Florida community college officials facing an employee drug testing challenge may assert that public employees should have a diminished expectation of privacy. The Supreme Court has held that the Fourth Amendment creates an implicit right to privacy,¹³⁰ but it is now held that right is limited to a "reasonable expectation of privacy."¹³¹ In workplace privacy decisions, even where the court recognizes that the individual's privacy expectations are reasonable, those expectations are balanced against legitimate governmental special needs. In *Katz v. United States*,¹³² the Court identified "a reasonable expectation of privacy" as an essential precondition of Fourth Amendment protection. Reasonable expectations of privacy require that the individual exhibit an expectation of privacy and that the expectation is "one that society is prepared to regard as reasonable."¹³³

In *Katz*, the Court said that "what one knowingly exposes to the public, even in his own home or office, is

¹³⁰ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

¹³¹ Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?* 29 AM. BUS. L.J. 625 (Winter 1992). In his article, Mayer notes that a February 1992 computer search of federal cases revealed that the term "reasonable expectation of privacy" is mentioned in 1,631 cases since 1944.

¹³² *Katz v. United States*, 389 U.S. 347 (1967).

¹³³ *Id.* at 361.

not subject to Fourth Amendment protection."¹³⁴ Therefore, it could be argued that a community college employee who knowingly exhibits behavior in the workplace that would lead to reasonable suspicion of drug use and, thus, urinalysis, has forfeited his or her Fourth Amendment protections. Since *Katz*, the Burger and Rehnquist Courts have generally found privacy expectations in public places unreasonable or have found that reasonable expectations have failed to outweigh government needs.¹³⁵

Conclusions

The researcher reviewed relevant federal and state case law; federal acts, rules and regulations; state statutes; legal literature; and current Florida community college substance abuse policies. Synthesis of the information provided by those sources led to the following conclusions:

(1) Executive Order 12,564, issued September 15, 1986,¹³⁶ (See Appendix B) marked the beginning of a deterioration in individual privacy rights as related to employee drug screening. The mandated testing of thousands of federal employees proved the catalyst for countless employee drug screening programs in both the public and

¹³⁴ *Id.* at 351.

¹³⁵ Mayer, *supra* note 132, at 629.

¹³⁶ 3 C.F.R. 224 (1986), reprinted in 5 U.S.C. § 7301 (1988).

private sectors. Generally speaking, such programs have stood the test of numerous court challenges.

(2) It is clear that Florida community colleges, as recipients of federal funds, must establish substance abuse policies that address, at a minimum, the requirements of the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989. Employee drug testing, however, is not mandated by those Acts.

With some exceptions, current Florida community college substance abuse policies address the minimum requirements of the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989, if only in a generic sense. Some policies more explicitly address the requirements than others; some fail to address certain requirements altogether. As rules under the Omnibus Transportation Employee Testing Act of 1991 (See Appendix G) were not finalized until 1994, none of the policies address that federal law and must, therefore, be updated to reflect compliance.

(3) Case law offers little explicit guidance on the legality of Florida community colleges conducting employee drug testing programs. While numerous decisions have been rendered on student-athlete drug testing programs in higher education,¹³⁷ there are virtually no cases on record

¹³⁷ See e.g., *Bally v. Northeastern University*, 403 Mass. 713, 532 N.E.2d 49 (1989); *Derdeyn v. University of Colorado*, 114 S.Ct. 1646 (1994); *Hill v. NCAA*, 865 P.2d 633, 26 Cal.Rptr.2d 834 (1994).

involving college or university employees. However, the case of *Georgia Association of Educators v. Harris*¹³⁸ included the Georgia Board of Regents among the defendants. In *Harris*, testing all job applicants for teaching positions in Georgia was struck down as an unreasonable search action. Beyond *Harris*, case law guidance on the legality of drug testing community college employees must be drawn from a broader context.

(4) That Florida community colleges are not state actors has been argued by the state Attorney General, and similar opinions have been offered by the State Board of Community Colleges' general counsel. However, the overwhelming preponderance of legal theory suggests that Florida community colleges are, indeed, state actors. First, this conclusion is based on Chapter 240.3031 of the Florida Statutes, entitled "State Community College System Defined." It is clear that the twenty-eight community colleges listed in Chapter 240.3031 are defined as part of a "state" system. In addition, Chapters 240.305 through 240.311 provide for a "State Board of Community Colleges," the members of which include the Commissioner of Education, an elected state official, and eleven gubernatorial appointees.

Even if it were to be successfully argued that Florida's community colleges are not state agencies, the well established legal theories outlined in Kaplin's *The Law*

¹³⁸ *Georgia Association of Educators v. Harris*, 749 F.Supp. 1110 (1990).

of Higher Education¹³⁹ support the contention that the colleges are private entities that are de facto state actors through their associations with government. A private entity may be considered a state actor when it (a) acts as an agent of government in performing a particular task delegated to it by government (delegated power theory); (b) performs a function that is generally considered the responsibility of government (public function theory); or (c) obtains substantial resources, prestige, or encouragement from its contacts with government (government contacts theory).¹⁴⁰ Florida community colleges inarguably have a strong nexus with government under each theory. As an example, Florida community colleges receive significant funding from two state sources, the State Community College Program Fund¹⁴¹ and the Educational Enhancement Trust Fund,¹⁴² more commonly known as the state lottery. Also, the colleges receive other government funding through numerous state grants, such as the Sunshine State Skills program.¹⁴³ The colleges also act as an agent of the federal government in administering such student funds as Pell Grants¹⁴⁴ and Carl Perkins Grants.¹⁴⁵

¹³⁹ KAPLIN, *supra* note 59, at 18.

¹⁴⁰ *Id.*

¹⁴¹ FLA. STAT. ch. 240.347 (1993). Also, Interview with Ray Kinsey, Vice President for Fiscal Affairs at Central Florida Community College (June 15, 1994).

¹⁴² FLA. STAT. ch. 24.121(5)(d) (1993).

¹⁴³ FLA. STAT. ch. 240.301 (1993).

¹⁴⁴ FLA. STAT. ch. 240.409 (1993).

In addition, the Florida case of *Smith v. Bendix*¹⁴⁶ supports the conclusion that Florida community colleges are state actors. In *Smith*, the court stated that

state action exists where (1) the state and the private part or entity maintain a sufficiently interdependent or symbiotic relationship; (2) the state requires and encourages, or is otherwise significantly involved in nominally private conduct; and (3) the private person or entity exercises a traditional state function.¹⁴⁷

It would seem paradoxical that, on the one hand, some suggest Florida's community colleges are not state actors. Yet, on the other hand, nearly all the community colleges cite the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989 as authorizations for their substance abuse policies. If the colleges fall under the auspices of the aforementioned federal Acts, as recipients of grants at or above a specific monetary amount, then the institutions must be state actors.

(5) Having concluded that Florida's community colleges are state actors, the Florida Statute pertaining to employee drug testing applicable to the colleges is Chapter 112.0455, entitled "Florida Drug-Free Workplace Act, Public Officers and Employees." Chapter 112.0455 provides authorization for

¹⁴⁵ Interview with Ray Kinsey, Vice President for Fiscal Affairs at Central Florida Community College (June 15, 1994).

¹⁴⁶ *Smith v. Bendix Field Engineering Corp.*, 1992 W.L. 316313 (M.D. Fla.).

¹⁴⁷ *Id.* at 2.

drug testing of job applicant finalists for "safety-sensitive" positions as well as reasonable suspicion and post-accident testing of current employees. The language employed in some Florida community college drug testing policies reflects recognition of the colleges being state actors.¹⁴⁸ As an example, one policy calls for the testing of job applicant finalists only in the case of safety sensitive or special risk jobs and defines reasonable suspicion by quoting Chapter 112.0455.¹⁴⁹ In contrast, the language in another policy indicates college officials recognize Florida Statutes Chapter 440.102 as the legal authority, as the policy provides for pre-employment testing of all full-time job finalists, irrespective of public safety concerns.¹⁵⁰ It is arguable that those community colleges operating under Chapter 440.102 are in error, and that the uniform drug testing of job finalists in non-safety sensitive positions, would not be upheld by the courts in the event of a legal challenge.¹⁵¹

It is also concluded that because Florida community colleges are state actors, any person impacted by a college drug testing program is entitled to the Fourth Amendment

¹⁴⁸ See e.g., Okaloosa-Walton Community College Policy No. 6Hx17-5.021.

¹⁴⁹ *Id.*

¹⁵⁰ See e.g., Florida Community College at Jacksonville Board of Trustees Rule No. 6Hx7-2.22.

¹⁵¹ See e.g., *Harris*, 749 F.Supp. 1110; *Beattie*, 733 F.Supp. 1455.

protection against unreasonable governmental search and seizure actions.

(6) As Florida community colleges are self-insured in regard to workers' compensation,¹⁵² any insurance premium benefits inferred in Chapter 287.087 of the Florida Statutes are not applicable to the colleges. Therefore, it is concluded that cost-effectiveness as related to workers' compensation insurance premiums is not a viable administrative justification for drug testing of Florida community college employees.

(7) Florida community college officials can be reasonably assured that drug testing based on individualized suspicion will be upheld by the courts, although that assurance is not an absolute. In two lower court decisions subsequent to *Skinner* and *Von Raab*, *American Federation of Government Employees v. Martin*¹⁵³ and *City and County of Denver v. Casados*,¹⁵⁴ the drug testing of government employees was upheld where the suspicion was based upon on-duty drug use or off-duty drug use that manifested itself in diminished on-the-job performance. Reasonable suspicion based on off-duty drug use with no on-the-job implications

¹⁵² Telephone interview with Brenda Diaz, assistant director of the Florida Community College Risk Management Consortium (June 13, 1994).

¹⁵³ *American Federation of Government Employees v. Martin*, 969 F.2d (9th Cir. 1992).

¹⁵⁴ *City and County of Denver v. Casados*, 862 P.2d 908 (Colo. 1993).

has been ruled a violation of the employee's Fourth Amendment rights.¹⁵⁵ The dissent by two justices in *Casados* demonstrates the tenuous nature of testing employees even on the basis of on-duty reasonable suspicion of illicit drug use. In the dissent, Justice Vollack wrote:

Were I to engage in balacing, I would find the government's interest in maintaining a safe work environment does not justify the privacy intrusions at issue. Government interest in the safety of a workplace has been recognized as being reasonable. The drug testing policy is not limited to employees holding safety- or security-sensitive positions. The City does not serve a specialized function such as the interdiction of illegal narcotics, which, by its nature, involves safety- or security-sensitive functions. There is no direct nexus between all positions held by City and County of Denver employees and an unasserted, feared violation. Without more, I would not find that the interest of a safe work environment alone justifies the substantial intrusions into all employees' rights to bodily integrity occasioned by urine testing.¹⁵⁶

Despite other lower court rulings indicating a preponderance toward eroding employee privacy rights,¹⁵⁷ Justice Vollack's dissent illustrates the disparate views that still exist even in regard to reasonable suspicion drug testing.

¹⁵⁵ *Id.* at 913.

¹⁵⁶ *Id.* at 920.

¹⁵⁷ See e.g., *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C.Cir. 1989), *cert. denied*, 110 S.Ct. 864 (1990); *Guiney v. Roche*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 404 (1989).

(8) There is limited basis, considering the seminal Supreme Court decisions in *Skinner* and *Von Raab*, for the suspicionless drug testing of current Florida community college employees other than those in safety sensitive or special risk positions. It is arguable that the Court's decisions in *Skinner* and *Von Raab* should be narrowly interpreted. In the case of *Skinner*, uniform drug testing was sanctioned for railroad employees in jobs having a direct link with public safety. Moreover, there had been a history of railway accidents related to drug use, and the employees, because of the nature of their jobs, had minimal privacy expectations. In *Von Raab*, testing was sanctioned relative to U.S. Customs Service jobs involving persons who carried firearms and were charged with the safety of the nation's borders. Some employees were also dealing with sensitive information requiring a high degree of confidentiality.

Few jobs, as listed in Florida community college catalogs and described by human resource officers, could be considered as safety-sensitive as those on which *Skinner* and *Von Raab* were based. It is concluded that absent reasonable suspicion and/or such compelling government interests as public safety and national security, the privacy rights of employees would outweigh other lesser interests of Florida's community colleges. It is predictable that, absent reasonable suspicion, the courts would support a challenge

of an employee drug testing policy by a worker in a non-safety sensitive position.

The Florida case of *Beattie v. City of St. Petersburg Beach*¹⁵⁸ illustrates how one court narrowly viewed the *Skinner* and *Von Raab* decisions. In *Beattie*, a Florida court struck down the suspicionless drug testing of firefighters because it found that the job of a firefighter was not analogous to a railway worker or Customs Service agent in terms of public safety. The court stated that

although firefighters are engaged in hazardous work involving the public safety and must be able to think and react quickly, the City's firefighters do not carry firearms and are not required to use deadly force in the regular course of their duties.¹⁵⁹

It is, therefore, concluded that if a Florida firefighter's job does not implicate public safety to the degree that government's interests are compelling enough to outweigh the individual's privacy rights, then neither do the jobs of most Florida community college employees, who are not nearly so directly linked to public safety as a firefighter.¹⁶⁰

(9) It is further concluded that government interests such as institutional integrity and higher productivity

¹⁵⁸ *Beattie v. City of St. Peterburg Beach*, 733 F.Supp. 1455 (1990).

¹⁵⁹ *Id.* at 1459.

¹⁶⁰ For an argument further supporting this position, see e.g., *Hartness v. Bush*, 712 F.Supp. 986 (D.D.C. 1989).

would not be compelling enough to outweigh individual privacy interests.¹⁶¹ Yet, those lesser interests might support the validity of an employee drug testing program which was primarily founded on public safety.

(10) Florida community college employees may have lesser privacy expectations than persons not employed by government. However, it is logical that the courts would hold that Florida community college employees have greater privacy expectations than railway workers, i.e., *Skinner*, directly involved in public safety and customs agents carrying firearms, i.e., *Von Raab*. A review of cases involving the National Collegiate Athletic Association's (NCAA) urinalysis program offers some parallels on the privacy expectation issue. It could be argued that high profile student-athletes, e.g., major college football players who regularly appear on national television, should have somewhat diminished privacy expectations. Yet, in most cases, drug testing programs involving NCAA affiliate student-athletes have been struck down as constitutionally unreasonable search actions.¹⁶² It is, therefore, arguable that Florida community college employees have as much, if not more, privacy expectations than major college student-athletes often in the public eye. Moreover, a large

¹⁶¹ See e.g., *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989).

¹⁶² See e.g., *Derdeyn*, 114 S.Ct. 1646 (1994).

percentage of community college employees are teaching faculty. It is arguable that such personnel, by the very nature of their jobs, have a high expectation of privacy inherent in such traditional concepts as academic freedom.

(11) There is no evidence of a history of drug abuse among Florida community college employees,¹⁶³ although it could be argued from a purely statistical standpoint that there is undoubtedly some illicit drug use among such employees.¹⁶⁴ It should be remembered that the railway industry's well-documented history of accidents related to drug use was cited by the Supreme Court as persuasive in upholding employee drug testing in *Skinner*. The Federal Railroad Administration in *Skinner* had identified at least twenty-one significant train accidents in which alcohol or drug use was cited as a probable cause or contributing factor to those accidents, resulting in twenty-five fatalities, sixty-one non-fatal injuries, and property

¹⁶³ This conclusion was based upon a review of numerous newspaper articles about Florida community colleges regularly distributed by the State Board of Community Colleges. There were no articles concerning substance abuse in recent years. Moreover, one Florida community college human resource officer, Ms. Janice Harris of Central Florida Community College, said in a personal interview that she was not aware of any arrests of Florida community college employees for a substance abuse violation during her tenure of over twenty years.

¹⁶⁴ This conclusion is based on a 1991 study conducted by the Institute for a Drug-Free Workplace, which revealed that 13 percent of all Florida workers are offered drugs in the workplace and that 8 percent of those are approached to purchase drugs at work. See *Institute Special Reports, DRUG-FREE WORKPLACE REP. 9* (Summer 1993).

damage estimated at \$19 million. The agency further concluded that an additional seventeen fatalities to operating employees working on or around the rail rolling stock were drug-related. No information surfaced in this study that indicated any Florida community college had documented a history of employee drug use nor on-the-job accidents even remotely akin to those which caused the Supreme Court to uphold employee drug testing in *Skinner*.¹⁶⁵

Since there is no established history of drug use among Florida community college employees, it is logical to conclude that nor can there be any established history of lost productivity, absenteeism, and so on, as a result of drug dependency. Therefore, any argument for employee drug testing on a cost-effectiveness basis would have to be made in a broader context to include national studies involving other industries.

(12) Florida community colleges are not mandated by any state or federal law to test any employee for illicit drug use with the exception of those who must be licensed as commercial drivers and operate vehicles of sixteen or more passengers and/or weigh in excess of 26,000 pounds.¹⁶⁶ In the case of those employees holding commercial drivers licenses, it is clear that the federal Department of Transportation

¹⁶⁵ For an additional argument supporting this position, see e.g., *Beattie*, 733 F.Supp. 1455.

¹⁶⁶ See Omnibus Transportation Employee Act of 1991, 59 FED. REG. 31 (February 15, 1994).

(DOT) requires drug testing. However, this law will have minimal impact on Florida's community colleges, as the incidence of staff operating vehicles falling under the DOT guidelines is minimal. Transportation of athletic teams and other student groups to off campus events is an example of an infrequent use of a commercial vehicle for a Florida community college.¹⁶⁷

(13) There is little support in case law for the constitutionality of random drug testing in community colleges. In terms of urinalysis, random testing is arguably the most intrusive search action possible, as random testing is not predicated on a warrant or reasonable suspicion. The U.S. Supreme Court did not address random testing in either *Skinner* or *Von Raab*; however, the Court upheld without comment a ban of the random drug testing of University of Colorado student-athletes in *Derdeyn*. That decision must be construed as a defeat for proponents of random testing. One Florida community college had until early 1994 a student-athlete random drug testing program.¹⁶⁸ Based on *Derdeyn*, such programs are unconstitutional.¹⁶⁹

¹⁶⁷ Personal interview with Ray Kinsey, vice president for business services, Central Florida Community College (June 15, 1994).

¹⁶⁸ Personal interview with Dr. Donald Hunt, vice president for student services, Central Florida Community College (June 14, 1994).

¹⁶⁹ See also, *Acton v. Vernonia School District*, 23 F.3d 1514 (1994).

Summary

Judicial response to employee drug testing lacks predictability. The issue, to a degree, is state-specific, and court decisions have not been entirely consistent across judicial circuits. Florida law authorizes drug testing, but does not mandate it. A common thread in case law and the literature pertaining to those cases is that court decisions have great relevance to job categories. Drug testing programs have been weighed on a case-by-case basis. As few jobs in the Florida community college system directly implicate public safety; as community college employees have considerable privacy expectations; as institutional integrity and cost effectiveness have not been viewed as significant in justifying the legality of urinalysis programs; defending suspicionless testing of rank-and-file employees would be difficult.

Nonetheless, it is incumbent upon Florida community college officials to establish an employee substance abuse policy that reflects, at a minimum, the requirements of the Drug-Free Workplace Act of 1988, the Drug-Free Schools and Communities Act Amendments of 1989, and the Omnibus Employee Testing Act (DOT). Drug testing should unquestionably be a component of such policies as related to community college employees required to hold a commercial drivers license. Beyond that, in the absence of clear case law direction, whether community college officials include employee drug testing as a component of the college substance abuse policy

is a matter of administrative judgment. To assist Florida community college officials in establishing a contemporary drug-free workplace, a model employee substance abuse policy, including a drug screening option, is presented in Chapter V of this study.

CHAPTER V
A MODEL SUBSTANCE ABUSE POLICY
FOR FLORIDA COMMUNITY COLLEGES

It is clear that Florida's community colleges, as recipients of federal funds, must establish an employee substance abuse policy, in accordance with the Drug-Free Workplace Act of 1988¹ (See Appendix C) and the Drug-Free Schools and Communities Act Amendments of 1989² (See Appendix D). It is also clear, in accordance with the Omnibus Transportation Employee Testing Act of 1991³ (See Appendix G), that community colleges must drug test employees whose jobs require them to hold a commercial drivers license (CDL) in order legally to transport certain numbers of passengers. The purpose of this study was to formulate a model substance abuse policy which would, at a minimum, address the requirements of each of the aforementioned federal laws. Additionally, an optional employee drug testing component was formulated for those college officials who view urinalysis as a desirable element of a substance abuse policy. The importance of establishing a comprehensive employee substance abuse policy, however,

¹ 41 U.S.C. §§ 701-707 (Supp. 1991).

² 20 U.S.C. § 3224(a) (1989).

³ 59 Fed. Reg. 7353 (February 15, 1994).

transcends a community college's legal obligations. It is also a matter of combating the societal scourge of drug abuse, promoting good health among employees, protecting the general well-being of the workforce and all college constituents, and furthering the institution's mission.

To achieve such ends, the importance of a clear and comprehensive substance abuse policy cannot be over emphasized.⁴ According to the U.S. Department of Labor, a model substance abuse program should contain five elements: a written substance abuse policy, a supervisory training program, an employee education and awareness program, access to an employee assistance program (EAP), and a drug testing component, where appropriate.⁵ A model substance abuse policy should accomplish, among other objectives, the following:

- (1) Let employees and applicants know that drug and alcohol abuse on the job, or that affects job performance, is not permitted;
- (2) Explain why the employer is establishing the policy, e.g., workplace safety, worker health, product quality, productivity, public liability; and

⁴ DALE A. MASI, DRUG-FREE WORKPLACE: A GUIDE FOR SUPERVISORS 134 (1987).

⁵ AN EMPLOYER'S GUIDE TO DEALING WITH SUBSTANCE ABUSE 3 (1990).

- (3) Inform employees what will happen in the event of a violation of the policy.⁶

The following model policy, including the employee drug screening option, was formulated by synthesizing information resulting from the study of relevant federal and state laws, case law, literature, and existing Florida community college substance abuse policies. A summation of this study and recommendations for further study follow the model policy and its accompanying attachments.

A Florida Community College
Substance Abuse Policy Model

The District Board of Trustees of _____ College is committed to providing a safe work environment and encourages personal health. The abuse of drugs on the job is an unsafe and counterproductive work practice. Substance abuse poses a serious threat to the College's staff, students, and campus visitors.

_____ College will, therefore, strive to maintain a campus environment free from the abuse of drugs. To further this commitment, the College shall adopt and implement procedures and guidelines to implement the provisions of this Rule.

This policy shall be published and distributed annually to each employee and student in response to the Drug-Free Schools and Communities Act Amendments of 1989

⁶ *Id.* at 4.

(20 U.S.C. § 3224(a) (1989), the Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701-707 [Supp. 1991]), and the Florida Drug Free Workplace Act (Fla. Stat., § 112.0455).

Compliance with Drug-Free Workplace Act of 1988
and Drug-Free Schools and Communities Act Amendments of 1989

As _____ College regularly receives federal funding and/or contracts with the federal government in amounts of \$25,000 or more, the institution must comply with the provisions of the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989. In accordance with these Acts and by way of this policy

(1) The College President, as authorized representative, certifies to the federal government and other appropriate agencies that _____ College is making a good-faith effort to maintain a drug-free workplace, and that the program and activities listed within this rule shall be reviewed biennially to (a) determine their effectiveness and implement changes as needed; and (b) ensure that sanctions against violators of this policy are consistently enforced. Moreover, College publications and correspondence, as appropriate, will proclaim the institution as a drug-free workplace.

In furtherance of the College's good-faith effort, all job applicants of the institution will be required to sign a drug-free certification document as a prerequisite to

hiring. (See Attachment A.) All current employees will be required to either (a) sign a drug-free certification document (See Attachment A), or (b) otherwise personally acknowledge acceptance of this policy before Human Resource Office representatives, as a prerequisite to continued employment.

Additionally, every student application for admission to the institution will contain a drug-free certification statement that must be signed before admission is approved.

All certification statements (or other acknowledgments) of existing employees, job applicants, and students will be considered legal contracts between those persons and the College. The contract will be considered broken upon any conviction of an offense relating to the possession, sale, purchase, delivery, use, manufacture or distribution of illegal drugs or controlled substances.

(2) The District Board of Trustees, hereby, notifies all employees and students of the "Standards of Conduct" relative to this policy. Any member of the college community including students, faculty, administrators, staff and support personnel is expected to act responsibly in all areas of personal and social conduct; and to recognize the potential for alcohol and drug abuse whenever alcohol or illegal drugs are sold, given, and/or used, and that such abuse is in conflict with the College's purpose. The unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the

workplace or during any college-related event. Exceptions to this rule, e.g., the serving of alcohol at a college-related social function, must be authorized in advance by the President. Any violation of this rule will result in disciplinary actions as provided for in the "Procedural Guidelines" section of this policy. The responsibility for knowing of and abiding by the College's substance abuse policy rests with each individual.

(3) The District Board of Trustees, hereby, establishes an ongoing, drug-free awareness program to inform employees of the danger of substance abuse as well as the availability of drug counseling programs and the possibility of penalties for drug abuse violations. As a component of the College's drug awareness program, this policy will be distributed annually to all personnel. Also, the College will provide annual training programs for supervisors in prevention, identification, documentation and referral relative to substance abuse; and annually distribute to other personnel and students educational literature on substance abuse.

As additional components of the College's drug awareness program, employees are, hereby, notified of the following:

(a) Health risks associated with substance abuse -
Drugs cause physical and emotional dependence. Drug and alcohol abuse increase the chances of violence, personal injuries, automobile accidents, heart disease, strokes, cancer, emphysema, liver disease, AIDS, brain cell

destruction, and other diseases and symptoms of physical deterioration to the user. Even low to moderate doses of drugs and/or alcohol increase the incidence of a variety of aggressive acts, including spouse and child abuse. Also, the safety of employees abusing drugs and alcohol, and that of their co-workers, can be greatly jeopardized. The U.S. Department of Labor has established that illegal drug users cause at least four times as many workplace accidents as non-users. Thousands of these "accidents" have resulted in death or permanent disability to innocent co-workers and the general public.

Health risks specifically associated with various controlled substances are delineated in Attachment B of this policy.

(b) Legal sanctions - Under federal and state laws, illegal drug activities can result in prison sentences ranging from probation to life imprisonment.

Florida sanctions--Florida Statutes (§ 893.13 [1] [e]) provide that any person who sells, purchases, manufactures, delivers, or possesses with the intent to sell, purchase, manufacture, or deliver a controlled substance within 1,000 feet an educational facility in Florida may be convicted of a first-degree felony. Any person who violates this paragraph with respect to a controlled substance named or described in Florida Statutes § 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree punishable as provided in § 775.082, § 775.083, or

§ 775.084 and shall be sentenced to a minimum prison term of three (3) years and shall not be eligible for parole or release under the Control Release Authority or statutory gain time under § 944.275 prior to serving such minimum sentence. Controlled substances cited in Florida Statutes, § 893.03, include but are not limited to: heroin, cannabis, mescaline, lysergic acid diethylamide (LSD), opium, cocaine, amphetamines, methaqualone, steroids, diazepam, and phenobarbital.

In addition, possession of open containers of alcoholic beverages in vehicles, under the Florida State Traffic Law Statute (§ 310.1936), is prohibited.

Federal sanctions--It is a violation of Federal Regulation 21-844 for "any person to knowingly or intentionally possess a controlled substance unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one (1) year, a fine of not more than \$5,000, or both."

Penalties under federal law for drug trafficking generally are more severe than under state law and range up to life imprisonment and individual fines up to \$8,000,000, depending on the particular substance and quantity involved.

(c) College disciplinary sanctions--It is College policy that the illegal use of alcohol or drugs on campus or in any of its activities is strictly prohibited, and any

employee violating this policy is subject to disciplinary action, up to and including immediate dismissal and referral for prosecution. Consumption of alcoholic beverages and/or intoxication during work hours also violates College policy and will subject the offending employee to disciplinary action up to and including immediate dismissal.

For students, any violation of this policy or conviction of any criminal drug statute, will result in dismissal from the institution, or any lesser penalty, as determined by the President.

For campus visitors, any violation of this policy or conviction of any criminal drug statute will result in the subject being banned from college premises, at the discretion of the President. College officials will work with appropriate legal authorities to implement a "no trespass" sanction against the subject, and a violation of that sanction will result in the subject being immediately reported to legal authorities for purposes of prosecution.

(d) Counseling/Rehabilitation programs--Specific information on the availability of area drug counseling and rehabilitation programs can be obtained by employees through the Human Resources Office. Employees who are first-time violators of the College's substance abuse policy may, at the discretion of the President, be offered the alternative of enrolling in a recognized counseling/rehabilitation program in lieu of disciplinary sanctions.

(e) Curriculum--The College encourages faculty to incorporate, as appropriate, substance abuse education into the curriculum as an additional component of the institution's comprehensive drug awareness effort.

(4) The District Board of Trustees, hereby, requires any employee directly involved in the work of a federal contract or grant to notify his or her immediate supervisor within five (5) days of any criminal drug statute conviction for a violation occurring in the workplace; and pledges, in turn, to notify the federal government of any such violation within ten (10) days. The employee's responsibility will be acknowledged on the Employee Drug-Free Certification form. (See Attachment A.)

The Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989 specifically implicate, but are not limited to, college personnel who are categorized as either direct-charge or indirect-charge employees. A direct-charge employee is an individual whose services are paid directly by grant funds. An indirect-charge employee is one who performs support or overhead functions related to the project funded by the grant and for whom the federal government pays its share of expenses under the grant program. However, an indirect-charge employee whose impact or involvement is insignificant to the performance of the work funded by the grant is exempt from the Acts' coverage. A student employed by the College under

a work-study program may be covered to the extent he or she works at the College in which he or she is enrolled.

For federal contractors, a covered employee is an individual directly engaged in the performance of the work under the government contract. "Directly engaged" includes all employees whose services the contract will directly fund and any other employee who has more than minimal involvement with the contract.

(5) The College pledges to continue in good faith to comply with the requirements of the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989.

Procedural Guidelines

(1) The procedures adopted in furtherance of this policy shall be made pursuant to applicable state and federal law, and may be amended as appropriate to conform to said law without amending this Rule.

(2) The use of medically prescribed medications and drugs is not a violation of this policy. However, failure by the employee to inform his or her immediate supervisor, before beginning work, that he or she is taking medications or drugs that have the potential to interfere with the safe and effective performance of duties or operation of equipment is a violation of this policy. Such a violation can result in disciplinary action up to, and including termination. If there is any question about an employee's

ability to safely and effectively perform assigned duties while using such medications or drugs, clearance from a qualified physician is required.

(3) The College administration reserves the right to search, without employee consent, all areas and property over which the institution maintains complete control or joint control with the employee. Otherwise, the college administration may notify the appropriate law enforcement agency that an employee may have illegal drugs in his or her possession or in an area not jointly or fully controlled by the College.

(4) Any employee reasonably believed by supervisors or law enforcement personnel to be under the influence of drugs may be prevented from engaging in further work.

(5) In accordance with the Americans with Disabilities Act (42 U.S.C. 12114, 1990), the College is committed to providing reasonable job support as an accommodation (including rehabilitation) to employees whose drug problems classify them as handicapped. However, the handicap must not prevent the employee from safely and effectively performing the functions of his or her job. Employee assistance programs are available to those employees who voluntarily seek help for drug problems. Employees are encouraged to contact the College's Human Resources Office for additional information.

(6) Irrespective of whether the employee accepts a referral to a voluntary employee assistance program or

another acceptable rehabilitation program and begins counseling, his or her supervisor will continue to be responsible for monitoring job performance. Disciplinary procedures will be followed if performance does not improve.

Disciplinary procedures are as follows:

STEP 1: Informal discussion of the performance problem with the employee establishes corrective action. It is the College's philosophy that, in most circumstances, each employee deserves a chance to correct his or her behaviors with normal supervisory guidance. Supervisors should attempt to understand the employee's problem, but must insist that the substandard job performance be alleviated. If an employee admits to a drug-related problem, the supervisor should ask the employee to discuss his or her situation with a counselor through the voluntary employee assistance program or another acceptable program. The supervisor should document the meeting in writing.

STEP 2: A formal verbal warning should be made by the supervisor to the employee, stressing that unless corrective action is taken, more severe steps will be initiated. The meeting should be documented by the supervisor and a follow-up meeting scheduled.

STEP 3: A written warning is issued by the supervisor to the employee. The employee should sign the written warning. A follow-up meeting to evaluate the employee's performance should be established.

STEP 4: Job action should be taken by the supervisor, which may, as appropriate, include referral for rehabilitation, suspension, demotion, reassignment, and/or termination.

An employee who violates this policy for the first time may be offered the option of enrolling in a treatment program for drug abuse through the College's Employee Assistance Program. Any information disclosed by an employee who voluntarily acknowledges a drug problem prior to any disciplinary action being taken and enters the College's Employee Assistance Program will be treated as completely confidential. The College's insurance will provide coverage for treatment in accordance with the provisions of the insurance policy in force at the time of treatment.

The College will monitor the employee's compliance with the treatment plan, and the successful completion of the treatment will be a condition for continued employment. If an employee who enters a rehabilitation program fails to respond or, after completing the treatment, resumes use of illegal drugs, he or she will be subject to termination or whatever administrative action is deemed appropriate.

Employees who face disciplinary action or termination as a result of a violation of this policy may be entitled to

a due process hearing. The provisions of the Florida Administrative Procedures Act (Fla. Stat. § 120.51) and the Florida Administrative Code (Fla. Stat. § 120.55) may apply.

(7) Definitions

(a) Controlled substance means a substance in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812) and as prescribed by Florida Statute § 893.03.

(b) Conviction means a finding of guilt (including a plea of no contest) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

(c) Criminal drug statutes means a criminal statute involving manufacture, distribution, dispensation, use, or possession of any controlled substance.

(d) Drug-Free Workplace means a site for the performance of work done in connection with a specific grant or contract at which employees are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(e) Warning means a verbal statement issued to employee by immediate supervisor. The meeting should be documented with a memorandum of record with a copy given to the employee and a copy filed in the Human Resources Office.

(f) Reprimand means a memorandum from immediate supervisor to the employee and filed in the Human Resources

Office. The employee will be requested to sign a copy of the reprimand to acknowledge receipt.

(g) Suspension means one (1) to five (5) days off work without pay. Annual leave or sick leave may not be used to compensate for such losses in pay. A suspension action is taken by a college vice president, provost, or dean with approval of the President.

(h) Termination means suspension from work without pay to be determined by the President pending final action by the District Board of Trustees.

Employee Drug Testing Option

To promote a safer environment for all staff and students, _____ College, in accordance with provisions of the Florida Statutes (Chapter 112.0455) and, where applicable, the Omnibus Transportation Employee Testing Act of 1991 (59 Fed. Reg. 7353), is authorized to conduct drug screening tests of employees and prospective employees. This policy provides for drug screening of all persons who are

- (1) finalists for regular part-time and full-time employment in safety-sensitive or special risk positions;
- (2) college employees upon reasonable suspicion;
- (3) college employees who have entered drug or alcohol treatment programs in the course of employment as a follow-up to such programs;

- (4) college employees involved in an on-the-job accident; and
- (5) college employees who must, in accordance with Federal Department of Transportation rules, maintain a valid commercial drivers license (CDL) in order to legally transport college personnel, students, and/or other persons.

The following guidelines, which are congruent with "Mandatory Guidelines for Federal Workplace Drug Testing Programs" (Fed. Reg., Vol. 59, No. 110, June 9, 1994,), shall be enacted in full compliance with the College's due process procedures and other applicable rules. The "Mandatory Guidelines for Federal Workplace Drug Testing" (See Appendix H) can be reviewed in the Human Resources Office or in the College Library.

Drug Testing Procedural Guidelines

(1) Refusal to submit to drug or alcohol screening--The refusal to submit to drug or alcohol testing as provided by this policy or the procedures promulgated in furtherance thereof, will be treated as a positive confirmed test for purposes of referral and discipline.

(2) Responsibilities of the Institution

(a) The College will provide primary candidates and employees with the opportunity to confidentially report the use of prescription and non prescription medications both before and after drug testing.

(b) Prior to the testing procedure, the College will provide employees and job candidates with a list of common medications which may alter or affect a drug or alcohol test. (See Attachment C).

(c) Prior to testing procedure, the College will supply the job applicant or employee with a list of all drugs for which the employer will test, described by brand names or common names as well as chemical names. (See Attachment C).

(d) All information and drug test results received by the College through the College's drug testing program are confidential communications and may not be used in any criminal proceeding against the employee or job applicant; nor be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except as provided herein.

(e) All information and drug test results received by the College may be released upon written consent voluntarily signed by the person tested.

(f) The College, agent of the College, or laboratory conducting a drug test will have access to employee drug test information when consulting with legal counsel in connection with actions brought against the College.

(g) Certifying bodies of special risk employees shall have access to positive confirmed drug test results for the purpose of reviewing certification.

(h) Any disciplinary action will be in accordance with college disciplinary systems.

(i) The College will provide employees in supervisory positions with annual drug and alcohol awareness training.

Employment Procedures

(1) Job announcements will state that _____ College is a Drug-Free Workplace, and that the College requires a satisfactory drug test as a condition of regular part-time and full-time employment in safety-sensitive or special risk positions.

(2) Administrators and supervisors with the authority to recommend individuals for employment shall advise the primary candidate for the position that:

(a) The College's Substance Abuse policy requires satisfactory results on a pre-employment drug test as a condition of employment; and

(b) The Human Resources Office will contact the candidate with further information and instructions to arrange drug testing.

(3) Administrators and supervisors shall notify the Director of Human Resources of the name of the primary candidate.

(4) The Human Resources Office is responsible for contacting the primary candidate to arrange for pre-employment drug screening and for notifying the recommending administrator of the results.

Types of Employee Drug or Alcohol Testing

Post-Accident Drug or Alcohol Testing

(1) Employees who are involved in an accident during the performance of their duties may be tested for the presence of alcohol or drugs if

(a) the accident results in personal injury or property damage; and

(b) there is reasonable suspicion that drugs or alcohol were involved.

(2) Supervisors shall immediately inform the Human Resources Office of any accident involving personal injury or property damage.

(3) If an employee's supervising administrator determines that the above factors are present, the Director of Human Resources will be instructed to arrange drug testing within four (4) hours of the approval request.

Reasonable Suspicion Drug Testing

(1) An employee will be required to submit to reasonable suspicion drug or alcohol testing if

(a) there is reasonable suspicion that an employee is using or has used drugs or alcohol in violation of the College's Substance Abuse policy, indicating that there is reasonable concern as to that employee's ability to safely perform regularly assigned duties;

(b) a satisfactory explanation is not provided for the employee's behavior or performance; and

(c) the employee's supervising administrator recommends drug or alcohol testing based on a determination of the above factors.

(2) Reasonable suspicion drug testing means drug testing based on a belief that an employee is using or has used drugs or alcohol in violation of college policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Reasonable suspicion may be based on, among other things, the following:

- observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of drugs or alcohol;

- a pattern of abnormal conduct or erratic behavior while at work or a significant deterioration in work performance over a period of time;

- a report of drug use occurring in the workplace or during college-sponsored activities, provided by a reliable and credible source, which has been independently corroborated;

- evidence that an individual has tampered with a drug test while employed by the College;

- information that an employee has caused, or contributed to an accident while at work; or

- evidence that an employee has used, possessed, sold solicited, or transferred drugs while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

(3) If the President or designee approves a request for drug or alcohol testing, the Director of Human Resources will contact the employee and arrange for drug or alcohol testing to take place within twelve (12) hours from receipt of an approved request.

(4) The President or designee authorizing a drug or alcohol test must provide the Director of Human Resources with the details in writing which formed the basis for the determination of reasonable suspicion, prior to arranging for drug or alcohol testing. The Director of Human Resources must provide a copy of this information to the employee at the employee's written request.

Witnessing Violations of Policy

Any employee who witnesses the use, possession, or sale of an illegal substance by another employee on College property should immediately report that information to campus security or the Director of Human Resources. Failure to report such information shall constitute a violation of the College's Substance Abuse Policy.

Drug and Alcohol Testing Procedures

(1) The College will arrange for the employee's transportation to the drug testing facility.

(2) Drug and alcohol testing will be conducted at a facility licensed and approved by the Agency for Health Care Administration.

(3) All drug and alcohol testing will be conducted in accordance with state laws, rules and regulations.

(4) A specimen for testing will be taken or collected by a physician, a physician's assistant, a registered professional nurse, a licensed practical nurse, a nurse practitioner, a certified paramedic who is presently at the scene of an accident for the purpose of rendering emergency medical service or treatment, or a qualified person employed by an approved laboratory.

(5) Each specimen collected for testing shall undergo an initial and confirmation test.

(6) The employee or job candidate must present photo identification at the designated drug testing facility.

(7) Prior to testing, the employee or job candidate will receive a list of common medications which may affect the drug and alcohol test results. (See Attachment C).

(8) Prior to the testing procedure, the College will supply the job applicant or employee with a list of all drugs for which the employer will test, described by brand

names or common names as well as chemical names. (See Attachment D).

(9) Employees or job candidates will be given the opportunity to confidentially report the use of prescription or non-prescription drugs which may affect alcohol and drug test results. This information should be reported to the drug testing facility and will be kept confidential along with the test results.

(10) Prior to the testing procedure, employees and job applicants may consult with the medical review officer or laboratory official about technical information regarding prescription and non-prescription medications.

(11) Laboratories shall provide technical assistance to the employee or job candidate for the purpose of interpreting any positive confirmed test result which could have been caused by the prescription or non-prescription medication taken by the employee or job candidate.

(12) The refusal to submit to alcohol or drug testing will be treated as an unsatisfactory (positive) result for purposes of referral and discipline.

(13) If the confirmed test result is satisfactory (negative), the employee will return to work without prejudice. Continued performance problems will be handled according to established procedures. Job candidates who test negative will be recommended to the Board of Trustees for employment.

(14) An employee whose confirmed test is positive for the presence of illicit drugs or alcohol may be referred to a drug or alcohol treatment program through the college's Employee Assistance Program or to a private physician if it is the employee's first confirmed positive test.

(15) Refusal to undergo rehabilitation or treatment following referral will be considered a violation of the College's Drug-Free Campus and Workplace Policy and will result in immediate termination from employment.

(16) An employee's failure to satisfactorily complete the drug or alcohol rehabilitation program or a second positive confirmed test result may result in immediate termination from employment.

(17) Job candidates who fail to pass a drug test are ineligible to reapply for employment with the college for a minimum of six (6) months following the date the confirmed positive was received by the College.

(18) The employee or job applicant must notify the testing laboratory of any administrative or civil action brought pursuant to the Florida Drug-Free Workplace Act, Fla. Stat. § 112.0455.

Rights of the Employee and Job Applicant

(1) Within five (5) working days of receiving a confirmed positive test result, the employee or job candidate will be notified in writing of the test results, by a College Human Resources officer the consequences of

such results, and the options available to the candidate or employee.

(2) Employees and job applicants have the right to contest or explain the results to the medical review officer within five (5) working days after the written notification.

(3) If an employee's explanation or challenge is unsatisfactory, the medical review officer shall report the positive confirmed test to the College and the person may contest the result pursuant to rules adopted by the Department of Labor and Employment Security.

(4) Within five (5) working days after receiving notice of a positive confirmed test result, an employee or job candidate may submit information to the College explaining or contesting the test result, and explaining why the result does not constitute a violation of the College's Substance Abuse Policy.

(5) If the job candidate's or employee's explanation or challenge of the positive test result is unsatisfactory to the College, a written explanation as to why the employee's or job candidate's explanation is unsatisfactory, along with the report of the positive result, shall be provided by the College to the employee or job candidate; and all such documentation shall be kept confidential by the College and retained by the College for at least one (1) year.

(6) Employees and job candidates will be provided copies of their drug or alcohol test results upon request.

Requests should be submitted in writing to the Director of Human Resources.

(7) Within 180 calendar days after receiving written notice of a positive drug or alcohol test, an employee or job candidate can demand that a portion of the original specimen be retested at the employee's own expense at another laboratory licensed and approved by the Agency for Health Care Administration which the employee or job candidate selects. The second laboratory must test the specimen at the same or greater sensitivity for the substance in question.

(8) Confidentiality

(a) All information and drug test results received by the College through the College's drug testing program are confidential communications and may not be used in any criminal proceedings against the employee or job candidate; nor be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except as provided herein.

(b) All information and drug test results received by the College may be released upon written consent voluntarily signed by the person tested.

(c) The College, agent of the College, or laboratory conducting a drug test will have access to employee drug test information when consulting with legal counsel in connection with actions brought against the College.

(d) Certifying bodies of special risk employees shall have access to positive confirmed drug test results for the purpose of reviewing certification.

Safety-Sensitive and Special Risk Employees

A safety-sensitive position is one in which drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires: the carrying of a firearm, performing life-threatening procedures, working with confidential information or documents pertaining to criminal investigations, working with controlled substances or a position in which a momentary lapse in attention could result in injury or death to another person.

A special-risk position is one required to be held by a person certified under Chapter 633, Florida Statutes or Chapter 943, Florida Statutes.

If an employee who is employed in a safety-sensitive or special risk position enters an employee assistance program, the employee will be assigned to a position other than a safety sensitive or special-risk position. If such a position is not available, the employee will be placed on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

Personnel who are employed in a special-risk position may be discharged by a public employer for a positive confirmed test result.

ATTACHMENT A

COLLEGE
EMPLOYEE DRUG-FREE CERTIFICATION STATEMENT

As an employee or prospective employee of _____ College, I certify that I will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance while on College property or while conducting any activity associated with the College.

I understand that if I am found to be in violation of the provisions set forth in the College's Substance Abuse Policy, that I am subject to suspension, termination, participation in a drug rehabilitation program and/or such other actions as the College deems appropriate.

I pledge to notify the College within five (5) days of any work-related conviction for any offense relating to the sale, purchase, delivery, use, manufacturing or distribution of illegal drugs or controlled substances.

I certify that I have read and understand the above statement and acknowledge that this form will be placed in my official personnel file.

Name: Last, First, Middle

Social Security No.

Employee's Signature

Date

c: Official Personnel File

ATTACHMENT B*

HEALTH RISKS ASSOCIATED WITH CONTROLLED SUBSTANCES

Stimulants**Amphetamines***Some Effects*

Increased heart rate &
blood pressure, loss of
appetite, increased activity

Feeling of alertness, self-
confidence, sometimes
followed by depression

Hallucinations, paranoia,
temporary mental
derangement as a result of
heavy doses

Hazards of Abuse

User can go beyond physical
limits & suffer harmful
exhaustion

Tolerance & physical &
psychological dependence
can develop: withdrawal
from the drug can result in
suicidal dependence

Continued high doses can
cause heart problems,
infections, malnutrition,
death

Cocaine*Some Effects*

Quickened pulse &
circulation, sharpened
reactions, restlessness

Feelings of well-being,
alertness, overconfidence,
confusion, anxiety,
depression

Paranoia, nervous
exhaustion, hallucinations
as a result of heavy doses

Hazards of Use

Chronic use can destroy
nasal tissue

Smoking can cause lesions
in lungs

Tolerance & physical &
psychological dependence
can develop

Effects are unpredictable--
convulsions, respiratory
paralysis & death are
always possible

Depressants

Barbiturates

Some Effects

Slowed heart rate & breathing, lowered blood pressure

Slowed reactions, confusion, weakened emotional control, distortion of reality, reduced awareness, intoxication

Hazards of Abuse

Tolerance & Physical & psychological dependence can develop with long-term use

Depressants can cause car crashes and other serious accidents due to slowed reactions, confusion, etc.

Tranquilizers

Some Effects

Slowed heart rate & breathing, lowered blood pressure

Relaxation, drowsiness, confusion, loss of coordination, intoxication, changes in personality

Hazards of Abuse

Overdoses can cause coma, respiratory arrests, convulsions, even death

Accidental overdoses occur because abuser is unaware of how much of the drug has been taken

Withdrawal can be dangerous & may require medical attention

Methaqualone

Some Effects

Slowed heart rate & breathing, lowered blood pressure

Sleepiness, feeling of well-being, loss of coordination, dizziness, impaired perception, confusion; later, hangover

Hallucinogens

Lysergic Acid Diethylamide

Some Effects

Increased heart rate, blood pressure, blood sugar, irregular breathing

Hazards of Abuse

Tolerance develops quickly

Euphoria, loss of ability to separate fact & fantasy, distortion of senses, hallucinations, paranoia, panic, violence

Increased risk of birth defects in user's children

Effects may recur ("flashbacks") days or weeks later, even without further use of LSD

Suicide

Phencyclidine

Some Effects

Effects unpredictable; may include euphoria, distorted perceptions, depression, hallucinations, confusion, drowsiness, loss of coordination, irrational behavior

Hazards of Abuse

Tolerance develops quickly

Overdose can cause psychosis, convulsions, coma, death

Abuse can result in murder, suicide, accidents

Narcotics

Heroin, Morphine, Opium, Codeine, Meperidine, Methadone

Some Effects

Shallow breathing; reduced
hunger, thirst, sex drive;
drowsiness

Hazards of Abuse

Tolerance, physical &
psychological dependence
can develop

Euphoria, lethargy, heaviness
of limbs, apathy, loss of
ability to concentrate, loss
of judgment & self-control

Withdrawal is very painful

Overdose can cause coma,
convulsions, respiratory
arrest, death

Risks from long-term use
include malnutrition,
infection, hepatitis

Marijuana, Hashish, Hashish Oil

Some Effects

Increased heart rate, lowered
body temperature, stimulated
appetite, loss of
coordination

Hazards of Abuse

Long-term use may cause
moderate tolerance,
psychological dependence

Feeling of well-being,
intoxication; possible
confusion, distortion of
reality

Overdose may cause
paranoia, psychosis-like
state

Sometimes depression, panic;
sometimes no mood change

Effects of long-term use
are still being studied.
Long-term heavy use is
associated with chronic
lung disease & possibly
lung cancer

Large doses may sometimes
cause hallucinations

* Sources: "Drug Abuse Curriculum for Employee Assistance Program Professionals," (1989) National Institute on Drug Abuse, Washington, D.C.; "The Drug-Free Workplace: Your Rights and Responsibilities," Business & Legal Reports, Inc., Madison, Connecticut, © 1991; "Drugs and the Athlete...A Losing Combination," (1988) National Collegiate Athletic Association, Mission, Kansas.

ATTACHMENT C*

COMMON MEDICATIONS

Alcohol	All liquid medications containing ethyl alcohol (ethanol). Read label for alcohol content in medication. As an example, Vick's Nyquil is 25% (50 proof) ethyl alcohol; Comtrex is 20% (40 proof); Contact Severe Cold Formula Night Strength is 25% (50 proof); Listerine is 26.9% (54 proof).
Amphetamines	Obetrol, Biphedamine, Desoxyn, Dexedrine, Didrex, Ionamine, Fastin.
Cannabinoids	Marinol (Dronabinol, THC).
Cocaine	Cocaine HCl topical solution (Roxanne).
Phencyclidine	Not legal by prescription.
Methaqualone	Not legal by prescription.
Opiates	Paregoric, Parepectolin, Donnagel PG, Morphine, Tylenol with Codeine, Emprin with Codeine, APAP with Codeine, Aspirin with Codeine, Robitussin AC, Guaiatuss AC, Novahistine DH, Novahistine Expectorant, Dilaudid (Hydromorphone), M-S Contin and Roxanol (Morphine Sulfate), Percodan, Vicodin, Tussiorganidin, etc.
Barbiturates	Phenobarbital, Tuinal, Amytal, Nembutal, Seconal, Lotusate, Fiorinal, Fioricat, Esgic, Butisol, Mebaral, Butabarbital, Butalbital, phrenilin, Triad, etc.

Benzodiazepines Ativan, Azane, Calonopin, Dalmane,
Diazepam, Librium, Xanax, Serax,
Tranxene, Valium, Verstran, Halcion,
Paxipam, Restoril, Centrax.

Methadone Dolophine, Metadose.

Propoxyphene Darvocet, Darvon N, Dolene, etc.

* Sources: "Drug Abuse Curriculum for Employee Assistance Program Professionals," (1989) National Institute on Drug Abuse, Washington, D.C.; "The Drug-Free Workplace: Your Rights and Responsibilities," Business & Legal Reports, Inc., Madison, Connecticut, © 1991; "Drugs and the Athlete...A Losing Combination," (1988) National Collegiate Athletic Association, Mission, Kansas.

ATTACHMENT D*

DRUGS AND THEIR COMMON AND BRAND NAMES

Alcohol	booze or drink (including distilled spirits, and other intoxicating liquors).
Amphetamines	Binhetamine, Desoxyn, Dexedrine, Speed, uppers.
Cannabinoid	marijuana, hashish, hash, hash oil, pot, joint, roach, spleaf, grass, weed, reefer.
Cocaine	coke, blow, nose candy, snow, flake, crack, rock, freebase.
Phencyclidine	PCP, angel dust, hog.
Hallucinogens	LSD, Ecstasy
Heroin	Junk, H, Horse
Methaqualone	
Opiates	opium, dover's powder, paregoni, parepectolin.
Barbiturates	phenobarbital, tuinal, amytol.
Benzodiazipine	ativan, azene, colnopin, dalmone, diozypam, halcion, librium, poxipam, restoril, serax, transene, valium, vertron, xanax.

Synthetic Narcotics

Designer Drugs

Metabolites of any of the aforementioned substances.

* Sources: "Drug Abuse Curriculum for Employee Assistance Program Professionals," (1989) National Institute on Drug Abuse, Washington, D.C.; "The Drug-Free Workplace: Your Rights and Responsibilities," Business & Legal Reports, Inc., Madison, Connecticut, © 1991; "Drugs and the Athlete...A Losing Combination," (1988) National Collegiate Athletic Association, Mission, Kansas.

Summary

Without exception, Florida's twenty-eight community colleges have established employee substance abuse policies, as required by the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendments of 1989, there is no standard, correct policy. It is logical to assume that officials of each college have implemented policies which best assist the furtherance of their unique institutional goals and missions. A study of the twenty-eight college policies revealed that some policy makers have chosen to address the requirements of the aforementioned Acts in an implicit manner which may provide their institutions with a certain latitude. Other college policies are more explicit, meaning policy provisions which address federal requirements are more readily apparent.

For purposes of this study, the researcher sought to formulate a highly explicit policy - one that if audited by any government official would inarguably reflect, if not exceed, the requirements of the aforementioned federal laws. In addition, the researcher formulated an employee drug testing option, which would, at a minimum, address the relatively new requirements of the Omnibus Transportation Employee Testing Act of 1991. Florida community college officials may not desire to implement a comprehensive employee drug testing program, but must respond to the Department of Transportation requirements, if they employ

personnel who must hold a valid commercial drivers license (CDL) to legally transport college groups.

The model substance abuse policy and employee drug testing option presented in this study are intended to be resources on which Florida community college officials can draw. As in the case of any college rule or regulation, an employee substance abuse policy must be updated as appropriate to reflect changes in state and federal law.

That Florida has an illicit drug problem of ever-escalating proportion has been well documented. It would seem naive for any community college official to take the position that his or her institution is immune to illicit drug activity. Having a substance abuse policy in place that not only addresses legal requirements but also aggressively seeks to minimize, if not eradicate, the scourge of illicit drugs from the college campus is incumbent upon Florida community college leadership. Where illicit drugs exist learning cannot optimally occur.

Recommendations for Further Study

In this study, the researcher examined current substance abuse policies of Florida community colleges. No attempt was made to study actual practices. A study to determine the extent to which actual practices reflect existing policy would complement the knowledge gained in this study and contribute to the level of awareness and

understanding of how community colleges are addressing the issue of substance abuse.

Urinalysis remains a controversial issue with which the courts have not consistently dealt. A number of worthy studies could be conducted relative to drug screening. A study of the results of drug screening programs of the seven Florida community colleges which have implemented urinalysis as a component of substance abuse policies could offer valuable insight on the extent to which illicit drug use is a problem. Also, more in-depth study of relatively new federal legislation, e.g., the Omnibus Transportation Employee Act of 1991 and the Americans with Disabilities Act, and possible implications, thereof, relative to employee drug screening programs would be valuable to any agency affected by such laws. Continued monitoring of emerging case law relative to drug screening would prove similarly valuable.

This study focused on employee substance abuse policies and dealt passively with student policies. The researcher contacted officials representing the athletic departments of the twenty-eight Florida public community colleges. While none reported having a student drug screening policy in place, several indicated that such a policy was being considered. Therefore, the formulation of a model student drug screening policy could be the subject of yet another study.

APPENDIX A
DEFINITIONS

Definitions

The following terms and definitions are central to this study. The primary source quoted was Black's Law Dictionary, 6th edition.

Action indicates conduct; behavior; something done; the condition of acting; an act or series of acts. The term in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law.

An actor is one who acts. The term is used in the Restatement of Torts, Second, to designate either the person whose conduct is in question as subjecting him to liability toward another, or as precluding him from recovering against another whose tortuous conduct is a legal cause of the actor's injury.

Cause of action is the fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf.

Coercion means compulsion; constraint; compelling by force or arms or threat. It may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. As used in testamentary law, any pressure by which testator's action is restrained against his free will in the execution of his testament. "Coercion" that vitiates confession can be mental as well as physical, and question is whether accused was deprived of his free choice to admit, deny, or refuse to answer. A person is guilty of criminal coercion if, with purpose to unlawfully restrict another's freedom of action to his detriment, he threatens to: (a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as an official, or cause an official to take or withhold action.

Color of law means the appearance or semblance, without the substance, of legal right. Misuse of power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state, is action taken under "color of state law." Action taken by private individuals may be "under color of state law" for purposes

of 42 U.S.C.A. s 1983 governing deprivation of civil rights when significant state involvement attaches to action. Acts "under color of any law" of a State include not only acts done by State officials within the bounds or limits of their lawful authority, but also acts done without and beyond the bounds of their lawful authority; provided that, in order for unlawful acts of an official to be done "under color of any law", the unlawful acts must be done while such official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist in an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature or character, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official then and there exercising his official powers outside the bounds of lawful authority.

Consent is a concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. Agreement; approval; permission; the act or result of coming into harmony or accord.

Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the possession and exercise of sufficient mental capacity

to make an intelligent choice to do something proposed by another. It supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Consent is implied in every agreement. It is an act unclouded by fraud, duress, or sometimes even mistake.

Implied consent is that which is manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption or inference that the consent has been given. An inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or a lack of objection under circumstances signifying assent.

Defamation is an intentional false communication, either published or publicly spoken, that injures another's reputation or good name. Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community; may be criminal as well as civil. Includes both libel and slander. Defamation is that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. Statement which exposes person to contempt, hatred, ridicule or obloquy. To recover against a public official or public figure, plaintiff must prove that the defamatory statement was published with malice. Malice as used in this context means

that it was published either knowing that it was false or with a reckless disregard as to whether it was true or false.

Defendant is the person defending or denying; the party against whom relief or recovery is sought in an action or suit or the accused in a criminal case.

Discrimination, in constitutional law, is the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

Drug is an article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals and any article other than food intended to affect the structure or any function of the body of man or other animals.

Drug abuse is the state of chronic or periodic intoxication detrimental to the individual and to society,

produced by the repeated consumption of a drug, natural or synthetic.

Equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness. Doctrine simply means that similarly situated persons must receive similar treatment under the law.

Freedom of religion is the freedom to individually believe and to practice or exercise one's belief. The First Amendment protection embraces the concept of freedom to believe and freedom to act, the first of which is absolute, but the second of which remains subject to regulation for protection of society.

Illicit means not permitted or allowed; prohibited; unlawful.

In loco parentis means in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities. "Loco parentis" exists when person undertakes care and control of another in absence of such supervision by latter's natural parents and in absence of formal legal approval, and is temporary in

character and is not to be likened to an adoption which is permanent.

An invasion of privacy is the unwarranted appropriation or exploitation of one's personality, publicizing one's private affairs with which public has no legitimate concern, or wrongful intrusion into one's private activities, in such a manner as to cause mental suffering, shame or humiliation to person of ordinary sensibilities.

Malpractice means professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.

Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the

doing of something which a reasonable and prudent man would not do.

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances.

Negligent entrustment is negligence consisting of entrusting a dangerous article to another whom lender knows, or should know, is likely to use it in a manner involving unreasonable risk of harm to others.

Plaintiff is a person who brings an action; the party who complains or sues in a civil action and is so named on the record. A person who seeks remedial relief for an injury to rights; it designates a complainant. The prosecution in a criminal case. Plaintiff in error, in current nomenclature, "appellant," is the accepted word to indicate the party who seeks appellate review, and not plaintiff in error, as formerly.

Probable cause means reasonable cause; having more evidence for than against. A reasonable ground for belief in certain alleged facts. A set of probabilities grounded

in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction.

Public safety is cause for a state may exercise its police power (derivatively, a city or town) by enacting laws for the protection of the public from injury and dangers.

Reasonable suspicion is such suspicion which will justify officer, for Fourth Amendment purposes, in stopping defendant in public place is quantum of knowledge sufficient to induce ordinarily prudent and cautious man under circumstances to believe criminal activity is at hand. It must be based on specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant intrusion.

Reputation is the estimation in which one is held; the character imputed to a person by those acquainted with him. That by which we are known and is the total sum of how we are seen by others. General opinion, good or bad, held of a person by those of the community in which he resides. It is necessarily based upon hearsay, but may be admissible if falling within the established exceptions to the hearsay rule. "Character" is made up of the things an individual

actually is and does whereas "reputation" is what people think an individual is and what they say about him.

Respondeat superior means literally, let the master answer. This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. Under this doctrine a master is responsible for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment.

Under the doctrine an employer is liable for injury to person or property of another proximately resulting from acts of employee done within scope of his employment in the employer's service.

Right, as a noun, and taken in an abstract sense, means justice, ethical correctness, or consonance with the rules of law or the principles of morals. As an adjective, the term "right" means just, morally correct, consonant with ethical principles or rules of positive law. It is the opposite of wrong, unjust, illegal. A power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage.

Constitutional Rights is a classification of rights, with respect to the constitution of civil society. Thus, according to Blackstone, "the rights of persons, considered

in their natural capacities, are of two sorts, -absolute and relative; absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other."

Personal rights is a term of rather vague import, but generally it may be said to mean the right of personal security, comprising those of life, limb, body, health, reputation, and the right of personal liberty.

Private rights are those rights which appertain to a particular individual or individuals, and relate either to the person, or to personal or real property.

Right of privacy is the right to be let alone; the right of a person to be free from unwarranted publicity; and right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.

Term "right of privacy" is generic term encompassing various rights recognized to be inherent in concept of ordered liberty, and such right prevents governmental interference in intimate personal relationships or activities, freedoms of individual to make fundamental choices involving himself, his family, and his relationship with others.

Search consists of looking for or seeking out that which is otherwise concealed from view. An examination of a person's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged.

Seizure is an act of taking possession of property, e.g., for a violation of law or by virtue of an execution of a judgment. Term implies a taking or removal of something from the possession, actual or constructive, of another person or persons. A "seizure" of property (under Fourth Amendment) occurs when there is some meaningful interference with an individual's possessory interest in that property. Seizure of an individual, within the Fourth Amendment, connotes the taking of one physically or constructively into custody and detaining him, thus causing a deprivation of his freedom in a significant way, with real interruption of his liberty of movement. A "search" is a probing or exploration for something that is concealed or hidden from the searcher, whereas a "seizure" is a forcible or secretive dispossession of something against the will of the possessor or owner.

Self-incrimination refers to acts or declarations either as testimony at trial or prior to trial by which one

implicates himself in a crime. The Fifth Amendment, U.S.Const., as well as provisions in many state constitutions and laws, prohibit the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against himself. It is the burden of the government to accuse and to carry the burden of proof of guilt. The defendant cannot be compelled to aid the government in this regard.

Stare decisis is Latin for to abide by, or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. Doctrine is one of policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed, though later found to be not legally sound, but whether previous holding of court shall be adhered to,

modified, or overruled is within court's discretion under circumstances of case before it. Under doctrine, when point of law has been settled by decision, it forms precedent which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it. The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta or obiter dicta.

State action, in general, is used in connection with claims under due process clause and Civil Rights Act for which a private citizen is seeking damages or redress because of improper governmental intrusion into his life. In determining whether an action complained of constitutes "state action" within purview of Fourteenth Amendment, court must examine whether sufficiently close nexus exists between state and challenged action so that the action may fairly be treated as that of the state itself.

Tort, from Lat. torquere, to twist, tortus, twisted, wrested aside, is a private or civil wrong or injury, including action for bad faith breach of contract, for which

the court will provide a remedy in the form of an action for damages. A legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual.

A personal tort is one involving or consisting in an injury to the person or to the reputation or feelings, as distinguished from an injury or damage to real or personal property, called a "property tort."

An unlawful or unreasonable search, within constitutional immunity (Fourth Amendment) from unreasonable searches and seizures, is an examination or inspection without authority of law of premises or person with view to discovery of stolen, contraband, or illicit property, or for some evidence of guilt to be used in prosecution of criminal action.

Voluntary search, used in context of consent to search, means that consent was not result of duress or coercion, express or implied, or any other form of undue influence exercised against defendant.

Wrongful discharge is an at-will employee's cause of action against his former employer, alleging that his discharge was in violation of state or federal anti-discrimination statutes, public policy, an implied employment contract, or an implied covenant of good faith and fair dealing.

APPENDIX B
EXECUTIVE ORDER 12564

Executive Order 12564
Drug-Free Federal Workplace
September 15, 1986

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the

complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Workplace.

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Section 2. Agency Responsibilities.

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Section 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Section 4. Drug Testing Procedures.

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee

Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Section 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an

employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Section 6. Coordination of Agency Programs.

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Section 7. Definitions.

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Section 8. Effective Date.

This Order is effective immediately.

RONALD REAGAN

THE WHITE HOUSE,
September 15, 1986.

APPENDIX C
DRUG-FREE WORKPLACE ACT

TITLE 41. U.S.C.
PUBLIC CONTRACTS
CHAPTER 10--DRUG FREE WORKPLACE

s 701. Drug-free workplace requirements for Federal contractors

(a) Drug-free workplace requirement

(1) Requirement for persons other than individuals

No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 403(8) of this title, for the purposes of being awarded a contract for the procurement of any property or services of a value of \$25,000 or more from any Federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace by--

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about--

(i) the dangers of drug abuse in the workplace;

(ii) the person's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will--

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) Requirement for individuals

No Federal agency shall enter into a contract with an individual unless such contract includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

(b) Suspension, termination, or debarment of the contractor

(1) Grounds for suspension, termination, or debarment

Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that--

(A) the contractor or individual has made a false certification under subsection (a) of this section;

(B) the contractor violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a) (1) of this section; or

(C) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a) of this section.

(2) Conduct of suspension, termination, and debarment proceedings

(A) If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures.

(B) The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding.

(3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years. (Pub.L. 100-690, Title V, s 5152, Nov. 18, 1988, 102 Stat. 4304.)

APPENDIX D
DRUG-FREE SCHOOLS AND CAMPUSES ACT

CODE OF FEDERAL REGULATIONS
TITLE 34--EDUCATION
SUBTITLE A--OFFICE OF THE SECRETARY, DEPARTMENT OF EDUCATION
PART 86--DRUG-FREE SCHOOLS AND CAMPUSES

SUBPART A--GENERAL

s 86.1 What is the purpose of the Drug-Free Schools and Campuses Regulations?

The purpose of the Drug-Free Schools and Campuses Regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which adds section 1213 to the Higher Education Act and section 5145 to the Drug-Free Schools and Communities Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE), State educational agency (SEA), or local educational agency (LEA) must certify that it has adopted and implemented a drug prevention program as described in this part.
(Authority: 20 U.S.C. 1145g, 3224a)

s 86.2 What Federal programs are covered by this part?

The Federal programs covered by this part include--
(a) All programs administered by the Department of Education under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance; and
(b) All programs administered by any other Federal agency under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance.
(Authority: 20 U.S.C. 1145g, 3224a)

s 86.3 What actions shall an IHE, SEA, or LEA take to comply with the requirements of this part?

(a) An IHE, SEA, or LEA shall adopt and implement a drug prevention program as described in s 86.100 for IHEs, and ss 86.200 and 86.201 for SEAs and LEAs, to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.
(b) An IHE, SEA, or LEA shall provide a written certification that it has adopted and implemented the drug prevention program described in s 86.100 for IHEs, and ss 86.200 and 86.201 for SEAs and LEAs.
(Authority: 20 U.S.C. 1145g, 3224a)

s 86.4 What are the procedures for submitting a drug prevention program certification?

(a) IHE drug prevention program certification. An IHE shall submit to the Secretary the drug prevention program certification required by s 86.3(b).

(b) SEA drug prevention program certification. An SEA shall submit to the Secretary the drug prevention program certification required by s 86.3(b).

(c) LEA drug prevention program certification.

(1) The SEA shall develop a drug prevention program certification form and a schedule for submission of the certification by each LEA within its jurisdiction.

(2) An LEA shall submit to the SEA the drug prevention program certification required by s 86.3(b).

(3)(i) The SEA shall provide to the Secretary a list of LEAs that have not submitted drug prevention program certifications and certify that all other LEAs in the State have submitted drug prevention program certifications to the SEA.

(ii) The SEA shall submit updates to the Secretary so that the list of LEAs described in paragraph (c)(3)(i) of this section is accurate at all times.

(Approved by the Office of Management and Budget under control number 1880- 0522)

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.5 What are the consequences if an IHE, SEA, or LEA fails to submit a drug prevention program certification?

(a) An IHE, SEA, or LEA that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE, SEA, or LEA receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.6 When must an IHE, SEA, or LEA submit a drug prevention program certification?

(a) After October 1, 1990, except as provided in paragraph

(b) of this section, an IHE, SEA, or LEA is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE, SEA, or LEA has submitted a drug prevention program certification. (b)

(1) The Secretary may allow an IHE, SEA, or LEA until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE, SEA, or LEA establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE, SEA, or LEA that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that-

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3)(i) An IHE or SEA shall submit a request for an extension to the Secretary.

(ii)(A) An LEA shall submit any request for an extension to the SEA.

(B) The SEA shall transmit any such request for an extension to the Secretary.

(C) The SEA may include with the LEA's request a recommendation as to whether the Secretary should approve it.

(Approved by the Office of Management and Budget under control number 1880- 0522)

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.7 What definitions apply to this part?

(a) Definitions in the Drug-Free Schools and Communities Act. The following terms used in this part are defined in the Act: Drug abuse education and prevention Illicit drug use

(b) Definitions in EDGAR. The following terms used in this part are defined in 34 CFR part 77: Department EDGAR Local educational agency Secretary State educational agency.

(c) Other definitions. The following terms used in this part are defined as follows: Compliance agreement means an agreement between the Secretary and an IHE, SEA, or LEA that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE, SEA, or LEA will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part. Institution of higher education means--

(1) An institution of higher education, as defined in 34 CFR 600.4;

- (2) A proprietary institution of higher education, as defined in 34 CFR 600.5;
- (3) A postsecondary vocational institution, as defined in 34 CFR 600.6; and
- (4) A vocational school, as defined in 34 CFR 600.7.

SUBPART B - INSTUTIONS OF HIGHER LEARNING

s 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

- (a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of--
 - (1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;
 - (2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;
 - (3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
 - (4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and
 - (5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.
 - (b) A biennial review by the IHE of its program to--
 - (1) Determine its effectiveness and implement changes to the program if they are needed; and
 - (2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.
- (Approved by the Office of Management and Budget under control number 1880- 0522)
 (Authority: 20 U.S.C. 1145g)

s 86.101 What review of IHE drug prevention programs does the Secretary conduct?

The Secretary annually reviews a representative sample of IHE drug prevention programs.
(Authority: 20 U.S.C. 1145g)

s 86.102 What is required of an IHE that the Secretary selects for annual review?

If the Secretary selects an IHE for review under s 86.101, the IHE shall provide the Secretary access to personnel, records, documents and any other necessary information requested by the Secretary to review the IHE's adoption and implementation of its drug prevention program.
(Approved by the Office of Management and Budget under control number 1880- 0522)
(Authority: 20 U.S.C. 1145g)

s 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

(a) Each IHE that provides the drug prevention program certification required by s 86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by s 86.100(a) as well as the results of the biennial review required by s 86.100(b).

(b)(1) An IHE shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraph (a) of this section.
(ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.
(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880- 0522)
(Authority: 20 U.S.C. 1145g)

SUBPART C--STATE AND LOCAL EDUCATIONAL AGENCIES

s 86.200 What must the SEA's and LEA's drug prevention program for students include?

The SEA's and LEA's program for all students must, at a minimum, include the following:

(a) Age-appropriate, developmentally based drug and alcohol education and prevention programs (which address the legal, social, and health consequences of drug and alcohol use and which provide information about effective techniques for resisting peer pressure to use illicit drugs or alcohol) for all students in all grades of the schools operated or served by the SEA or LEA, from early childhood level through grade 12.

(b) A statement to students that the use of illicit drugs and the unlawful possession and use of alcohol is wrong and harmful.

(c) Standards of conduct that are applicable to students in all the SEA's and LEA's schools and that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students on school premises or as part of any of its activities.

(d) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law), up to and including expulsion and referral for prosecution disclose to the employer a written test result report within 7 working days after receipt of the sample. All laboratory reports of a drug test result shall, at a minimum, state:

1. The name and address of the laboratory which performed the test and the positive

ion of the person tested.

2. Positive results on confirmation tests only, or negative results, as applicable.

3. A list of the drugs for which the drug analyses were conducted.

4. The type of tests conducted for both initial and confirmation tests and the minimum cutoff levels of the tests.

5. Any correlation between medication reported by the employee or job applicant pursuant to subparagraph

(5)(b)2. and a positive confirmed drug test result.

No report shall disclose the

or absence of any drug other than a specific drug and its metabolites listed pursuant to this section.

(c) The laboratory shall submit to the Department

Health and Rehabilitative Services a monthly report with statistical inthis section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880- 0522)

(Authority: 20 U.S.C. 3224a)

s 86.201 What must the SEA's and LEA's drug prevention program for employees include?

The SEA's and LEA's program for all employees must, at a minimum, include the following:

(a) Standards of conduct applicable to employees that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol on school premises or as part of any of its activities.

(b) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law) up to and including termination of employment and referral for prosecution, will be imposed on employees who violate the standards of conduct required by paragraph (a) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(c) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to employees.

(d) A requirement that employees be given a copy of the standards of conduct required by paragraph (a) of this section and the statement of disciplinary sanctions described in paragraph (b) of this section.

(e) Notification to employees that compliance with the standards of conduct required by paragraph (a) of this section is mandatory.

(f) A biennial review by the SEA and LEA of its program to--
(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (b) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880- 0522)

(Authority: 20 U.S.C. 3224a)

s 86.202 What review of SEA and LEA drug prevention programs is required under this subpart?

(a) (1) An SEA shall annually review a representative sample of LEA programs.

(2) If an SEA finds, as a result of its annual review, that an LEA has failed to implement its program or consistently enforce its disciplinary sanctions, the SEA shall submit that information, along with the findings of its review, to the Secretary within thirty (30) days after completion of the review.

(b) The Secretary may annually select a representative sample of SEA programs for review.

(Approved by the Office of Management and Budget under control number 1880- 0522)

(Authority: 20 U.S.C. 3224a)

s 86.203 What is required of an SEA or LEA that is selected for review?

(a) If the Secretary selects an SEA for review under s 86.202(b), the SEA shall provide the Secretary access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(b) If the SEA selects an LEA for review under s 86.202(a), the LEA shall provide the SEA access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(Authority: 20 U.S.C. 3224a)

s 86.204 What records and information must an SEA or LEA make available to the Secretary and the public concerning its drug prevention program?

(a)(1) Each SEA that provides the drug prevention program certification shall, upon request, make available to the Secretary and the public full information about the elements of its drug prevention program, including the results of its biennial review required by ss 86.200(h) and 86.201(f).

(2) The SEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the SEA's compliance with the certification.

(b)(1) Each LEA that provides the drug prevention program certification shall, upon request, make available to the Secretary, the SEA, and the public full information about the elements of its program, including the results of its biennial review required by ss 86.200(h) and 86.201(f).

(2) The LEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the LEA's compliance with the certification.

(c)(1) Each SEA or LEA shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraphs (a) and (b) of this section.

(ii) Any other records related to the SEA's or LEA's compliance with the certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the SEA or LEA shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under
control number 1880- 0522)
(Authority: 20 U.S.C. 3224a)

SUBPART D--RESPONSES AND SANCTIONS ISSUED OR IMPOSED BY THE
SECRETARY FOR VIOLATIONS BY AN IHE, SEA, OR LEA

s 86.300 What constitutes a violation of this part by an
IHE, SEA, or LEA?

An IHE, SEA, or LEA violates this part by--

(a) Receiving any form of Federal financial assistance after
becoming ineligible to receive that assistance because of
failure to submit a certification in accordance with s
86.3(b); or

(b) Violating its certification. Violation of a
certification includes failure of an IHE, SEA, or LEA to--

(1) Adopt or implement its drug prevention program; or
(2) Consistently enforce its disciplinary sanctions for
violations by students and employees of the standards of
conduct adopted by an IHE under s 86.100(a)(1) or by an SEA
or LEA under ss 86.200(c) and 86.201(a).

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.301 What actions may the Secretary take if an IHE, SEA,
or LEA violates this part?

(a) If an IHE, SEA, or LEA violates its certification, the
Secretary may issue a response to the IHE, SEA, or LEA. A
response may include, but is not limited to--

(1) Provision of information and technical assistance; and
(2) Formulation of a compliance agreement designed to bring
the IHE, SEA, or LEA into full compliance with this part as
soon as feasible.

(b) If an IHE, SEA, or LEA receives any form of Federal
financial assistance without having submitted a
certification or violates its certification, the Secretary
may impose one or more sanctions on the IHE, SEA, or LEA,
including--

(1) Repayment of any or all forms of Federal financial
assistance received by the IHE, SEA, or LEA when it was in
violation of this part; and
(2) The termination of any or all forms of Federal financial
assistance that--

(i) (A) Except as specified in paragraph (b)(2)(ii) of this
section, ends an IHE's, SEA's, or LEA's eligibility to
receive any or all forms of Federal financial assistance.
The Secretary specifies which forms of Federal financial
assistance would be affected; and

(B) Prohibits an IHE, SEA, or LEA from making any new
obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.
(Authority: 20 U.S.C. 1145g, 3224a)

s 86.302 What are the procedures used by the Secretary for providing information or technical assistance?

(a) The Secretary provides information or technical assistance to an IHE, SEA, or LEA in writing, through site visits, or by other means.

(b) The IHE, SEA, or LEA shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE, SEA, or LEA in writing of--

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance; and

(2) The response the Secretary intends to issue.

(b) An IHE, SEA, or LEA may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph

(a)(2) of this section within 30 days after the date the IHE, SEA, or LEA receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE, SEA, or LEA, the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE, SEA, or LEA shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE, SEA, or LEA does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE, SEA, or LEA in accordance with the procedures in s 86.304.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance?

(a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance by sending the IHE, SEA, or LEA a notice by certified mail with return receipt requested. This notice--

(1) Informs the IHE, SEA, or LEA of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(2) Specifies, as appropriate--

(i) The amount of Federal financial assistance that must be repaid and the date by which the IHE, SEA, or LEA must repay the funds; and

(ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and

(3) Informs the IHE, SEA, or LEA that the repayment of Federal financial assistance will not be required or that the termination will not be effective on the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE, SEA, or LEA receives the notice of intent described in this paragraph--

(i) Written material indicating why the repayment of Federal financial assistance or termination should not take place; or

(ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's, SEA's, or LEA's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE, SEA, or LEA contends need not be repaid.

(b) If the IHE, SEA, or LEA does not request a hearing but submits written material--

(1) The IHE, SEA, or LEA receives no additional opportunity to request or receive a hearing; and

(2) The designated Department official, after considering the written material, notifies the IHE, SEA, or LEA in writing whether--

(i) Any or all of the Federal financial assistance must be repaid; or

(ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g, 3224a)

SUBPART E--APPEAL PROCEDURES

s 86.400 What is the scope of this subpart?

(a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE, SEA, or LEA to receive some or all forms of Federal financial assistance for violations of this part.

(b) An Administrative Law Judge (ALJ) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.401 What are the authority and responsibility of the ALJ?

(a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to--

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether--

(1) The IHE, SEA, or LEA received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE, SEA, or LEA violated its certification.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.402 Who may be a party in a hearing under this subpart?

(a) Only the designated Department official and the IHE, SEA, or LEA that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.403 May a party be represented by counsel?

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.404 How may a party communicate with an ALJ?

(a) A party may not communicate with an ALJ on any fact at issue in the case or on any matter relevant to the merits of the case unless the other party is given notice and an opportunity to participate.

(b)(1) To obtain an order or ruling from an ALJ, a party shall make a motion to the ALJ.

(2) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with s 86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in s 86.405(d).

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.405 What are the requirements for filing written submissions?

(a) Any written submission under this subpart must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d)(1) The filing date for a written submission is the date the document is--

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.

(e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(f) If a document is filed by facsimile transmission, the Secretary or the designated Department official, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.406 What must the ALJ do if the parties enter settlement negotiations?

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.

(b) The following are not admissible in any proceeding under this part:

(1) Evidence of conduct during settlement negotiations.

(2) Statements made during settlement negotiations.

(3) Terms of settlement offers.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.407 What are the procedures for scheduling a hearing?

(a) If the IHE, SEA, or LEA requests a hearing by the time specified in s 86.304(a)(3), the designated Department official sets the date and the place.

(b)(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.

(2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.

(c) No termination takes effect until after a hearing is held and a decision is issued by the Department.

(d) With the approval of the ALJ and the consent of the designated Department official and the IHE, SEA, or LEA, any time schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.408 What are the procedures for conducting a pre-hearing conference?

- (a) (1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by--
 - (i) The designated Department official; or
 - (ii) The IHE, SEA, or LEA.
 - (2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.
 - (b) A pre-hearing conference may consist of--
 - (1) A conference telephone call;
 - (2) An informal meeting; or
 - (3) The submission and exchange of written material.
- (Authority: 20 U.S.C. 1145g, 3224a)

s 86.409 What are the procedures for conducting a hearing on the record?

- (a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.
- (b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless--
 - (1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or
 - (2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.
- (c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE, SEA, or LEA. Procedures to expedite may include, but are not limited to, the following:
 - (1) A restriction on the number or length of submissions.
 - (2) The conduct of the hearing by telephone conference call.
 - (3) A review limited to the written record.
 - (4) A certification by the parties to facts and legal authorities not in dispute.
- (d) (1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.
- (2) The designated Department official has the burden of persuasion in any proceeding under this subpart.
- (3) (i) The parties may agree to exchange relevant documents and information.
- (ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any other exchange between the parties of documents or information.
- (4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.
- (e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to--

(1) The designated Department official; and (2) The IHE, SEA, or LEA on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.410 What are the procedures for issuance of a decision?

(a)(1) The ALJ issues a written decision to the IHE, SEA, or LEA, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after--

(i) The last brief is filed;

(ii) The last day of the hearing if one is held; or

(iii) The date on which the ALJ terminates the hearing in accordance with s 86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

(c)(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE, SEA, or LEA does not take effect pending the Secretary's review.

(e)(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g, 3224a)

s 86.411 What are the procedures for requesting reinstatement of eligibility?

(a) (1) An IHE, SEA, or LEA whose eligibility to receive any or all forms of Federal financial assistance has been terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE, SEA, or LEA must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment obligation imposed upon it under s 86.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE, SEA, or LEA shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

APPENDIX E
FLORIDA DRUG-FREE WORKPLACE ACT

TITLE X. PUBLIC OFFICERS, EMPLOYEES, AND RECORDS
CHAPTER 112. PUBLIC OFFICERS AND EMPLOYEES;
GENERAL PROVISIONS

112.0455. Drug-Free Workplace Act

- (1) Short title.--This section shall be known and may be cited as the "Drug-Free Workplace Act."
- (2) Purpose.--This section is intended to:
 - (a) Promote the goal of drug-free workplaces within government through fair and reasonable drug testing methods for the protection of public employees and employers.
 - (b) Encourage employers to provide employees who have drug use problems with an opportunity to participate in an employee assistance program or an alcohol and drug rehabilitation program.
 - (c) Provide for confidentiality of testing results.
- (3) Findings.--The Legislature finds that:
 - (a) Drug use has serious adverse effects upon a significant portion of the work force, resulting in billions of dollars of lost productivity each year and posing a threat to the workplace and to public safety and security.
 - (b) Maintaining a healthy and productive work force, safe working conditions free from the effects of drugs, and quality products and services is important to employers, employees, and the general public in this state. The Legislature further finds that drug use creates a variety of workplace problems, including increased injury on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.
 - (c) Certain drug testing standards are necessary to protect persons participating in workplace drug testing programs.
 - (d) In balancing the interests of employers, employees, and the welfare of the general public, the establishment of standards to assure fair and accurate testing for drugs in the workplace is in the best interests of all.

- (4) No legal duty to test.--All drug testing conducted by employers shall be in conformity with the standards established in this section and all applicable rules promulgated pursuant to this section. However, employers shall not have a legal duty under this section to request an employee or job applicant to undergo drug testing. No testing of employees shall take effect until local drug abuse assistance programs have been identified.
- (5) Definitions.--Except where the context otherwise requires, as used in this act:
- (a) "Drug" means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of the substances listed herein.
 - (b) "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites.
 - (c) "Initial drug test" means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens. All initial tests shall use an immunoassay procedure or an equivalent, or shall use a more accurate scientifically accepted method approved by the Agency for Health Care Administration as such more accurate technology becomes available in a cost-effective form.
 - (d) "Confirmation test," "confirmed test," or "confirmed drug test" means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen. The confirmation test must be different in scientific principle from that of the initial test procedure. This confirmation method must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.
 - (e) "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing for accountability at each stage in handling, testing, storing specimens, and reporting of test results.

(f) "Job applicant" means a person who has applied for a special risk or safety-sensitive position with an employer and has been offered employment conditioned upon successfully passing a drug test.

(g) "Employee" means any person who works for salary, wages, or other remuneration for an employer.

(h) "Employer" means any agency within state government that employs individuals for salary, wages, or other remuneration.

(i) "Prescription or nonprescription medication" means a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

(j) "Reasonable suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Reasonable suspicion drug testing shall not be required except upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question. Among other things, such facts and inferences may be based upon:

1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.

2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

3. A report of drug use, provided by a reliable and credible source, which has been independently corroborated.

4. Evidence that an individual has tampered with a drug test during his employment with the current employer.

5. Information that an employee has caused, or contributed to, an accident while at work.

6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

(k) "Specimen" means a tissue or product of the human body capable of revealing the presence of drugs or their metabolites.

(l) "Employee assistance program" means an established program for employee assessment, counseling, and possible referral to an alcohol and drug rehabilitation program.

(m) "Safety-sensitive position" means any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety.

(n) "Special risk" means employees who are required as a condition of employment to be certified under chapter 633 or chapter 943.

(6) Notice to employees.--

(a) Employers with no drug testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug testing program is being implemented and the beginning of actual drug testing. Employers with drug testing programs in place prior to the effective date of this section are not required to provide a 60-day notice period.

(b) Prior to testing, all employees and job applicants for employment shall be given a written policy statement from the employer which contains:

1. A general statement of the employer's policy on employee drug use, which shall identify:
 - a. The types of testing an employee or job applicant may be required to submit to, including reasonable suspicion or other basis; and
 - b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.
2. A statement advising the employee or job applicant of the existence of this section.
3. A general statement concerning confidentiality.
4. Procedures for employees and job applicants to confidentially report the use of prescription or nonprescription medications both before and after being tested. Additionally, employees and job applicants shall receive notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications shall be developed by the Agency for Health Care Administration.
5. The consequences of refusing to submit to a drug test.
6. Names, addresses, and telephone numbers of employee assistance programs and local alcohol and drug rehabilitation programs.

7. A statement that an employee or job applicant who receives a positive confirmed drug test result may contest or explain the result to the employer within 5 working days after written notification of the positive test result. If an employee or job applicant's explanation or challenge is unsatisfactory to the employer, the person may contest the drug test result as provided by subsections (14) and (15).

8. A statement informing the employee or job applicant of his responsibility to notify the laboratory of any administrative or civil actions brought pursuant to this section.

9. A list of all drugs for which the employer will test, described by brand names or common names, as applicable, as well as by chemical names.

10. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission.

11. A statement notifying employees and job applicants of their right to consult the testing laboratory for technical information regarding prescription and nonprescription medication. An employer shall include notice of drug testing on vacancy announcements for those positions where drug testing is required. A notice of the employer's drug testing policy shall also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy shall be made available for inspection by the general public during regular business hours in the employer's personnel office or other suitable locations.

(7) Types of testing.--An employer is authorized, but not required, to conduct the following types of drug tests:

(a) Job applicant testing.--An employer may require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusal to hire the job applicant.

(b) Reasonable suspicion.--An employer may require an employee to submit to reasonable suspicion drug testing.

(c) Routine fitness for duty.--An employer may require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's

established policy or that is scheduled routinely for all members of an employment classification or group.

(d) Follow up testing.--If the employee in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, the employer may require said employee to submit to a drug test as a followup to such program, and on a quarterly, semiannual, or annual basis for up to 2 years thereafter.

- (8) Procedures and employee protection.--All specimen collection and testing for drugs under this section shall be performed in accordance with the following procedures:

(a) A sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.

(b) Specimen collection shall be documented, and the documentation procedures shall include:

1. Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results.
2. A form for the employee or job applicant to provide any information he considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication, or other relevant medical information. Such form shall provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information shall not preclude the administration of the drug test, but shall be taken into account in interpreting any positive confirmed results.

(c) Specimen collection, storage, and transportation to the testing site shall be performed in a manner which will reasonably preclude specimen contamination or adulteration.

(d) Each initial and confirmation test conducted under this section, not including the taking or collecting of a specimen to be tested, shall be conducted by a licensed laboratory as described in subsection (12).

(e) A specimen for a drug test may be taken or collected by any of the following persons:

1. A physician, a physician's assistant, a registered professional nurse, a licensed practical nurse, a nurse practitioner, or a certified paramedic who is present at the

scene of an accident for the purpose of rendering emergency medical service or treatment.

2. A qualified person employed by a licensed laboratory.

(f) A person who collects or takes a specimen for a drug test conducted pursuant to this section shall collect an amount sufficient for two drug tests as determined by the Agency for Health Care Administration.

(g) Any drug test conducted or requested by an employer may occur before, during, or immediately after the regular work period of the employee, and shall be deemed to be performed during work time for the purposes of determining compensation and benefits for the employee.

(h) Every specimen that produces a positive confirmed result shall be preserved by the licensed laboratory that conducts the confirmation test for a period of at least 210 days from the time the results of the positive confirmation test are mailed or otherwise delivered to the employer. However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample shall be retained by the laboratory until the case or administrative appeal is settled. During the 180-day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee or job applicant's expense, at another laboratory, licensed and approved by the Agency for Health Care Administration, chosen by the employee or job applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory. The first laboratory which performed the test for the employer shall be responsible for the transfer of the portion of the specimen to be retested, and for the integrity of the chain of custody during such transfer.

(i) Within 5 working days after receipt of a positive confirmed test result from the testing laboratory, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant.

(j) The employer shall provide to the employee or job applicant, upon request, a copy of the test results.

(k) Within 5 working days after receiving notice of a positive confirmed test result, the employee or job applicant may submit information to an employer explaining or contesting the test results, and why the results do not constitute a violation of the employer's policy.

(l) If an employee or job applicant's explanation or challenge of the positive test results is unsatisfactory to the employer, a written explanation as to why the employee or job applicant's explanation is unsatisfactory, along with the report of positive results, shall be provided by the employer to the employee or job applicant. All such documentation shall be kept confidential and exempt from the provisions of s. 119.07(1) by the employer pursuant to subsection (11) and shall be retained by the employer for at least 1 year. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(m) No employer may discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test.

(n) In addition to the limitation under paragraph (m):

1. Except as provided in subparagraph 3., no employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program, and:

a. The employee has either refused to participate in the employee assistance program or the alcohol and drug rehabilitation program or has failed to successfully complete such program, as evidenced by withdrawal from the program before its completion or a report from the program indicating unsatisfactory compliance, or by a positive test result on a confirmation test after completion of the program; or

b. The employee has failed or refused to sign a written consent form allowing the employer to obtain information regarding the progress and successful completion of an employee assistance program or an alcohol and drug rehabilitation program.

2. An employee in a safety-sensitive position shall be placed by the employer in a non-safety-sensitive position, or if such position is unavailable, on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay.

3. A special risk employee may be discharged or disciplined for the first positive confirmed drug test result when illicit drugs, pursuant to s. 893.13, are confirmed. No special risk employee shall be permitted to continue work in a safety-sensitive position, but may be placed either in a non-safety-sensitive position or on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program.

(o) Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

(p) No employer may discharge, discipline, or discriminate against an employee, or refuse to hire a job applicant, on the basis of any prior medical history revealed to the employer pursuant to this section.

(q) An employer who performs drug testing or specimen collection shall use chain-of-custody procedures as established by the Agency for Health Care Administration to ensure proper recordkeeping, handling, labeling, and identification of all specimens to be tested.

(r) An employer shall pay the cost of all drug tests, initial and confirmation, which he requires of employees.

(s) An employee or job applicant shall pay the costs of any additional drug tests not required by the employer.

(t) No employer shall discharge, discipline, or discriminate against an employee solely upon voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered an alcohol and drug rehabilitation program. However, special risk employees may be subject to discharge or disciplinary action when the presence of illicit drugs, pursuant to s. 893.13, is confirmed.

(u) Where testing is conducted based on reasonable suspicion, each employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential and exempt from the provisions of s. 119.07(1) by the employer pursuant to subsection (11) and retained by the employer for at least 1 year. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(v) If an employee is unable to participate in outpatient rehabilitation, the employee may be placed on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave-without-pay status, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay. Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

(9) Confirmation testing.--

(a) If an initial drug test is negative, the employer may in its sole discretion and at the employer's expense seek a confirmation test.

(b) Only licensed laboratories as described in subsection (12) shall conduct confirmation drug tests.

(c) All positive initial tests shall be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the Agency for Health Care Administration as such technology becomes available in a cost-effective form.

(10) Employer protection.--

(a) No employee or job applicant whose drug test result is confirmed as positive in accordance with the provisions of this section shall, by virtue of the result alone, be defined as a person with a "handicap" as cited in the 1973 Rehabilitation Act.

(b) An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section shall be considered

to have discharged, disciplined, or refused to hire for cause.

(c) No physician-patient relationship is created between an employee or job applicant and an employer or any person performing or evaluating a drug test, solely by the establishment, implementation, or administration of a drug testing program.

(d) Nothing in this section shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules.

(e) Nothing in this section shall be construed to operate retroactively, and nothing in this section shall abrogate the right of an employer under state law to conduct drug tests prior to January 1, 1990. A drug test conducted by an employer prior to January 1, 1990 is not subject to this section.

(f) If an employee or job applicant refuses to submit to a drug test, the employer shall not be barred from discharging or disciplining the employee, or from refusing to hire the job applicant. However, nothing in this paragraph shall abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) An employer who refuses to hire a job applicant based on a positive confirmed drug test result shall not be required to hold the employment position vacant while the job applicant pursues administrative action. However, should the job applicant prevail in his actions, the employer shall provide him the opportunity of employment in the next available comparable position.

(h) An employer shall refer an employee with a first-time positive confirmed drug test result to an employee assistance program or an alcohol and drug rehabilitation program, unless such employee is discharged as provided in subparagraph (8)(n)3. If the results of a subsequent confirmed drug test are positive, the employer may discharge or discipline the employee.

(i) Nothing in this section shall be construed to prohibit an employer from conducting medical screening or other tests required by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to the specific substances expressly identified in the applicable statute,

rule, or regulation, unless prior written consent of the employee is obtained for other tests.

- (j) An employer shall place a safety-sensitive position employee whose drug test result is confirmed positive in a non-safety-sensitive position, or if such a position is unavailable, on leave status while the employee participates in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay.
- (k) A special risk employee may be discharged or disciplined on the first positive confirmed drug test result when illicit drugs, pursuant to s. 893.13, are confirmed. No special risk employee shall be permitted to continue work in a safety-sensitive position, but may be placed either in a non-safety-sensitive position or on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program.

(11) Confidentiality.--

- (a) All information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received by the employer through a drug testing program are confidential communications and are exempt from the provisions of s. 119.07(1) and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section.
- (b) Employers, laboratories, employee assistance programs, drug and alcohol rehabilitation programs, and their agents who receive or have access to information concerning drug test results shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the person tested, except where such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section, or where deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:
 1. The name of the person who is authorized to obtain the information.
 2. The purpose of the disclosure.
 3. The precise information to be disclosed.
 4. The duration of the consent.

5. The signature of the person authorizing release of the information.

(c) Information on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant.

Information released contrary to this section shall be inadmissible as evidence in any such criminal proceeding.

(d) Nothing herein shall be construed to prohibit certifying bodies of special risk employees from receiving information on positive confirmed drug test results for the purpose of reviewing certification.

(e) Nothing herein shall be construed to prohibit the employer, agent of the employer, or laboratory conducting a drug test from having access to employee drug test information when consulting with legal counsel in connection with actions brought under or related to this section or where the information is relevant to its defense in a civil or administrative matter.

(f) The exemptions in this subsection are subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(12) Drug testing standards; laboratories.--

(a) No laboratory may analyze initial or confirmation drug specimens unless:

1. The laboratory is licensed and approved by the Agency for Health Care Administration using criteria established by the National Institute on Drug Abuse as guidelines for modeling the state drug testing program.

2. The laboratory has written procedures to ensure chain of custody.

3. The laboratory follows proper quality control procedures, including, but not limited to: a. The use of internal quality controls including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment, and periodic use of blind samples for overall accuracy. b. An internal review and certification process for drug test results, conducted by a person qualified to perform that function in the testing laboratory. c. Security measures implemented by the testing laboratory to preclude adulteration of specimens and drug test results. d. Other necessary and proper actions taken to ensure reliable and accurate drug test results.

(b) A laboratory shall disclose to the employer a written test result report within 7 working days after receipt of the sample. All laboratory

reports of a drug test result shall, at a minimum, state:

1. The name and address of the laboratory which performed the test and the positive identification of the person tested.
2. Positive results on confirmation tests only, or negative results, as applicable.
3. A list of the drugs for which the drug analyses were conducted.
4. The type of tests conducted for both initial and confirmation tests and the minimum cut-off levels of the tests.
5. Any correlation between medication reported by the employee or job applicant pursuant to subparagraph (8)(b)2. and a positive confirmed drug test result.

No report shall disclose the presence or absence of any drug other than a specific drug and its metabolites listed pursuant to this section.

(c) The laboratory shall submit to the Agency for Health Care Administration a monthly report with statistical information regarding the testing of employees and job applicants. The reports shall include information on the methods of analyses conducted, the drugs tested for, the number of positive and negative results for both initial and confirmation tests, and any other information deemed appropriate by the Agency for Health Care Administration. No monthly report shall identify specific employees or job applicants.

(d) Laboratories shall provide technical assistance to the employer, employee, or job applicant for the purpose of interpreting any positive confirmed test results which could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

(13) [FN1PP] Rules.--

(a) The Agency for Health Care Administration is hereby authorized to promulgate rules, using criteria established by the National Institute on Drug Abuse as guidelines for modeling the state drug testing program, concerning, but not limited to:

1. Standards for drug testing laboratory licensing, suspension, and revocation of a license.
2. Body specimens and minimum specimen amounts which are appropriate for drug testing.
3. Methods of analysis and procedures to ensure reliable drug testing results, including standards for initial tests and confirmation tests.

4. Minimum cut-off detection levels for drugs or their metabolites for the purposes of determining a positive test result.

5. Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens being tested.

6. Retention, storage, and transportation procedures to ensure reliable results on confirmation tests and retests.

7. A list of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test.

(b) The Department of Management Services is hereby authorized to adopt rules for all executive branch agencies implementing this section.

(c) The Board of Regents is hereby authorized to promulgate rules for the State University System implementing this section.

(d) The State Courts Administrator is hereby authorized to promulgate rules for the state courts system implementing this section.

(e) The Justice Administrative Commission is hereby authorized to promulgate rules on behalf of the state attorneys and public defenders of Florida, the Office of Capital Collateral Representative of Florida, and the Judicial Qualifications Commission.

(f) The Joint Legislative Management Committee is hereby authorized to promulgate rules, policies, or procedures for the employees and members of the legislative branch implementing this section. This section shall not be construed to eliminate the bargainable rights as provided in the collective bargaining process where applicable.

(14) Discipline remedies.--

(a) An executive branch employee who is disciplined or who is a job applicant for another position and is not hired pursuant to this section, may file an appeal with the Public Employees Relations Commission. Any appeal must be filed within 30 calendar days of receipt by the employee or job applicant of notice of discipline or refusal to hire. The notice shall inform the employee or job applicant of the right to file an appeal, or if available, the right to file a collective bargaining grievance pursuant to s. 447.401. Such appeals shall be resolved pursuant to the procedures established in ss. 447.207(1)-(4), 447.208(2), and 447.503(4) and

(5). A hearing on the appeal shall be conducted within 30 days of the filing of the appeal, unless an extension is requested by the employee or job applicant and granted by the commission or an arbitrator.

(b) The commission shall promulgate rules concerning the receipt, processing, and resolution of appeals filed pursuant to this section.

(c) Appeals to the commission shall be the exclusive administrative remedy for any employee who is disciplined or any job applicant who is not hired pursuant to this section, notwithstanding the provisions of chapter 120. However, nothing in this subsection shall affect the right of an employee or job applicant to file a collective bargaining grievance pursuant to s. 447.401 provided that an employee or job applicant may not file both an appeal and a grievance.

(d) An employee or a job applicant who has been disciplined or who has not been hired pursuant to this section must exhaust either the administrative appeal process or collective bargaining grievance-arbitration process.

(e) Upon resolving an appeal filed pursuant to paragraph (c), and finding a violation of this section, the commission may order the following relief:

1. Rescind the disciplinary action, expunge related records from the personnel file of the employee or job applicant and reinstate the employee.
2. Order compliance with paragraph (10)(g).
3. Award back pay and benefits.
4. Award the prevailing employee or job applicant the necessary costs of the appeal, reasonable attorney's fees, and expert witness fees.

(15) Nondiscipline remedies.--

- (a) Any person alleging a violation of the provisions of this section, that is not remediable by the commission or an arbitrator pursuant to subsection (14), must institute a civil action for injunctive relief or damages, or both, in a court of competent jurisdiction within 180 days of the alleged violation, or be barred from obtaining the following relief. Relief is limited to:
1. An order restraining the continued violation of this section.
 2. An award of the costs of litigation, expert witness fees, reasonable attorney's fees, and noneconomic damages provided that damages shall be limited to the recovery of damages directly resulting from injury or

loss caused by each violation of this section. (b) Any employer who complies with the provisions of this section shall be without liability from all civil actions arising from any drug testing program or procedure performed in compliance with this section. (c) Pursuant to any claim alleging a violation of this section, including a claim under this section where it is alleged that an employer's action with respect to a person was based on an incorrect test result, there shall be a rebuttable presumption that the test was valid if the employer complied with the provisions of this section. (d) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug testing.

(16) Federal compliance.--

The drug testing procedures provided in this section do not apply where the specific work performed requires employees or job applicants to be subject to drug testing pursuant to:

- (a) Federal regulations that specifically preempt state and local regulation of drug testing with respect to such employees and job applicants;
- (b) Federal regulations or requirements enacted or implemented in connection with the operation of federally regulated facilities;
- (c) Federal contracts where the drug testing is conducted for safety, or protection of sensitive or proprietary data or national security; or
- (d) State agency rules that adopt federal regulations applicable to the interstate component of a federally regulated activity.

(17) License fee.--

Fees from licensure of drug testing laboratories shall be sufficient to carry out the responsibilities of the Agency for Health Care Administration for the regulation of drug testing laboratories. The Agency for Health Care Administration shall collect fees for all licenses issued under this part. Each nonrefundable fee shall be due at the time of application and shall be payable to the Agency for Health Care Administration to be deposited in a trust fund administered by the Agency for Health Care Administration and used only for the purposes of this section. The fee schedule is as follows: For licensure as a drug testing laboratory, an annual fee of not less than \$8,000 or more than \$10,000 per fiscal year; for late filing of an application for renewal, an additional fee of \$500 per day shall be charged.

- CR01 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR02 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR03 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR04 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR05 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR06 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR07 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR08 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR09 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.
- CR10 Amended by Laws 1993, c. 93-129, s 7, eff. Oct. 1, 1993.

APPENDIX F
FLORIDA DRUG-FREE WORKPLACE

FLORIDA STATUTES
TITLE XXXI.
LABOR CHAPTER 440. WORKERS' COMPENSATION

440.102. Drug-free workplaces

The following shall apply to a drug-free workplace program implemented pursuant to rules adopted by the division:

(1) Definitions.--Except where the context otherwise requires, as used in this act:

(a) "Drug" means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of the substances listed herein.

(b) "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites.

(c) "Initial drug test" means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens. All initial tests shall use an immunoassay procedure or an equivalent, or shall use a more accurate scientifically accepted method approved by the Department of Health and Rehabilitative Services as such more accurate technology becomes available in a cost-effective form.

(d) "Confirmation test," "confirmed test," or "confirmed drug test" means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen. The confirmation test must be different in scientific principle from that of the initial test procedure. This confirmation method must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.

(e) "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing for accountability at each stage in handling, testing, and storing specimens and reporting test results.

(f) "Job applicant" means a person who has applied for a position with an employer and has been offered employment conditioned upon successfully passing a drug test.

(g) "Employee" means any person who works for salary, wages, or other remuneration for an employer.

(h) "Employer" means a person or entity that employs a person and that is covered by the Workers' Compensation Law.

(i) "Prescription or nonprescription medication" means a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

(j) "Reasonable suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
3. A report of drug use, provided by a reliable and credible source, which has been independently corroborated.
4. Evidence that an individual has tampered with a drug test during his employment with the current employer.
5. Information that an employee has caused, or contributed to, an accident while at work.
6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

(k) "Specimen" means tissue, hair, or product of the human body capable of revealing the presence of drugs or their metabolites.

(l) "Employee assistance program" means an established program for employee assessment, counseling, and possible referral to an alcohol and drug rehabilitation program.

(2) Drug testing.--All drug testing conducted by employers shall be in conformity with the standards established in this section and all applicable rules adopted pursuant to this section. However, employers shall not have a legal duty under this section to request an employee or job applicant to undergo drug testing.

(3) Notice to employees and job applicants.--Prior to testing, all employees and job applicants for employment must be given a written policy statement from the employer which contains:

(a) A general statement of the employer's policy on employee drug use, which shall identify:

1. The types of testing an employee or job applicant may be required to submit to, including reasonable suspicion or other basis; and
2. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.

- (b) A statement advising the employee or job applicant of the existence of this section.
- (c) A general statement concerning confidentiality.
- (d) Procedures for employees and job applicants to confidentially report the use of prescription or nonprescription medications both before and after being tested. Additionally, employees and job applicants shall receive notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Department of Health and Rehabilitative Services shall be available to employers through the Division of Workers' Compensation of the Department of Labor and Employment Security.
- (e) The consequences of refusing to submit to a drug test.
- (f) Names, addresses, and telephone numbers of employee assistance programs and local alcohol and drug rehabilitation programs.
- (g) A statement that an employee or job applicant who receives a positive confirmed drug test result may contest or explain the result to the employer within 5 working days after written notification of the positive test result. If an employee's or job applicant's explanation or challenge is unsatisfactory to the employer, the person may contest the drug test result pursuant to rules adopted by the Department of Labor and Employment Security.
- (h) A statement informing the employee or job applicant of his responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section.
- (i) A list of all drugs for which the employer will test, described by brand names or common names, as applicable, as well as by chemical names.
- (j) A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.
- (k) A statement notifying employees and job applicants of their right to consult the testing laboratory for technical information regarding prescription and nonprescription medication.
- (l) An employer not having a drug testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug testing program is being implemented and the beginning of actual drug testing. An employer having a drug testing program in place prior to the effective date of this section is not required to provide a 60-day notice period.
- (m) An employer shall include notice of drug testing on vacancy announcements for those positions for which drug testing is required. A notice of the employer's drug testing policy must also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by the

general public during regular business hours in the employer's personnel office or other suitable locations.

(4) Types of testing.--An employer is required to conduct the following types of drug tests in order to qualify for the discounts provided under s. 627.0915:

(a) Job applicant testing.--An employer must require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusal to hire the job applicant.

(b) Reasonable suspicion.--An employer must require an employee to submit to reasonable suspicion drug testing.

(c) Routine fitness for duty.--An employer must require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.

(d) Follow-up testing.--If the employee in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, the employer must require the employee to submit to a drug test as a followup to such program, and on a quarterly, semiannual, or annual basis for up to 2 years thereafter.

(5) Procedures and employee protection.--All specimen collection and testing for drugs under this section shall be performed in accordance with the following procedures:

(a) A sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.

(b) Specimen collection shall be documented, and the documentation procedures shall include:

1. Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results.

2. A form for the employee or job applicant to provide any information he considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information. Such form shall provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information shall not preclude the administration of the drug test, but shall be taken into account in interpreting any positive confirmed results.

(c) Specimen collection, storage, and transportation to the testing site shall be performed in a manner which will reasonably preclude specimen contamination or adulteration.

(d) Each initial and confirmation test conducted under this section, not including the taking or collecting of a

specimen to be tested, shall be conducted by a licensed laboratory as described in subsection (9).

(e) A specimen for a drug test may be taken or collected by any of the following persons:

1. A physician, a physician assistant, a registered professional nurse, a licensed practical nurse, or a nurse practitioner or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment.

2. A qualified person employed by a licensed laboratory.

(f) A person who collects or takes a specimen for a drug test conducted pursuant to this section shall collect an amount sufficient for two drug tests as determined by the Department of Health and Rehabilitative Services.

(g) Every specimen that produces a positive confirmed result shall be preserved by the licensed laboratory that conducts the confirmation test for a period of at least 210 days after the results of the positive confirmation test are mailed or otherwise delivered to the employer. However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample shall be retained by the laboratory until the case or administrative appeal is settled. During the 180-day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee's or job applicant's expense, at another laboratory, licensed and approved by the Department of Health and Rehabilitative Services, chosen by the employee or job applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory. The first laboratory which performed the test for the employer shall be responsible for the transfer of the portion of the specimen to be retested, and for the integrity of the chain of custody during such transfer.

(h) Within 5 working days after receipt of a positive confirmed test result from the testing laboratory, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant.

(i) The employer shall provide to the employee or job applicant, upon request, a copy of the test results.

(j) Within 5 working days after receiving notice of a positive confirmed test result, the employee or job applicant may submit information to an employer explaining or contesting the test results, and why the results do not constitute a violation of the employer's policy.

(k) If an employee's or job applicant's explanation or challenge of the positive test results is unsatisfactory to the employer, a written explanation as to why the employee's or job applicant's explanation is unsatisfactory,

along with the report of positive results, shall be provided by the employer to the employee or job applicant; and all such documentation shall be kept confidential by the employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year.

(l) No employer may discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test.

(m) An employer who performs drug testing or specimen collection shall use chain-of-custody procedures as established by the Department of Health and Rehabilitative Services to ensure proper recordkeeping, handling, labeling, and identification of all specimens to be tested.

(n) An employer shall pay the cost of all drug tests, initial and confirmation, which he requires of employees.

(o) An employee or job applicant shall pay the costs of any additional drug tests not required by the employer.

(p) No employer shall discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered an alcohol and drug rehabilitation program.

(q) If testing is conducted based on reasonable suspicion, the employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential by the employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year.

(6) Confirmation testing.--

(a) If an initial drug test is negative, the employer may in its sole discretion seek a confirmation test.

(b) Only licensed laboratories as described in subsection(9) shall conduct confirmation drug tests.

(c) All positive initial tests shall be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the Department of Health and Rehabilitative Services as such technology becomes available in a cost-effective form.

(7) Employer protection.--

(a) No employee or job applicant whose drug test result is confirmed as positive in accordance with the provisions of this section shall, by virtue of the result alone, be defined as a person having a "handicap" as cited in the 1973 Rehabilitation Act.

(b) An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this

section shall be considered to have discharged, disciplined, or refused to hire for cause.

(c) No physician-patient relationship is created between an employee or job applicant and an employer or any person performing or evaluating a drug test, solely by the establishment, implementation, or administration of a drug testing program.

(d) Nothing in this section shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules.

(e) Nothing in this section shall be construed to operate retroactively, and nothing in this section shall abrogate the right of an employer under state law to conduct drug tests, or implement employee drug testing programs, prior to October 1, 1990; however, only those programs that meet the criteria outlined in this section qualify for reduced rates under s. 627.0915.

(f) If an employee or job applicant refuses to submit to a drug test, the employer shall not be barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, nothing in this paragraph shall abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) Nothing in this section shall be construed to prohibit an employer from conducting medical screening or other tests required by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests.

(8) Confidentiality.--The provisions of s. 119.07 to the contrary notwithstanding:

(a) All information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received by the employer through a drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section or in determining compensability under this chapter.

(b) Employers, laboratories, employee assistance programs, drug and alcohol rehabilitation programs, and their agents who receive or have access to information concerning drug test results shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the person tested, unless such release is

compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section, or unless deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:

1. The name of the person who is authorized to obtain the information.
2. The purpose of the disclosure.
3. The precise information to be disclosed.
4. The duration of the consent.
5. The signature of the person authorizing release of the information.

(c) Information on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section shall be inadmissible as evidence in any such criminal proceeding.

(d) Nothing herein shall be construed to prohibit the employer, agent of the employer, or laboratory conducting a drug test from having access to employee drug test information when consulting with legal counsel in connection with actions brought under or related to this section or when the information is relevant to its defense in a civil or administrative matter.

(9) Drug testing standards; laboratories.--

(a) No laboratory may analyze initial or confirmation drug specimens unless:

1. The laboratory is licensed and approved by the Department of Health and Rehabilitative Services using criteria established by the National Institute on Drug Abuse as guidelines for modeling the state drug testing program pursuant to this section.

2. The laboratory has written procedures to ensure the chain of custody.

3. The laboratory follows proper quality control procedures, including, but not limited to:

a. The use of internal quality controls including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment, and periodic use of blind samples for overall accuracy.

b. An internal review and certification process for drug test results, conducted by a person qualified to perform that function in the testing laboratory.

c. Security measures implemented by the testing laboratory to preclude adulteration of specimens and drug test results.

d. Other necessary and proper actions taken to ensure reliable and accurate drug test results.

(b) A laboratory shall disclose to the employer a written test result report within 7 working days after receipt of the sample. All laboratory reports of a drug test result shall, at a minimum, state:

1. The name and address of the laboratory which performed the test and the positive identification of the person tested.
2. Positive results on confirmation tests only, or negative results, as applicable.
3. A list of the drugs for which the drug analyses were conducted.
4. The type of tests conducted for both initial and confirmation tests and the minimum cutoff levels of the tests.
5. Any correlation between medication reported by the employee or job applicant pursuant to subparagraph (5)(b)2. and a positive confirmed drug test result.

No report shall disclose the presence or absence of any drug other than a specific drug and its metabolites listed pursuant to this section.

(c) The laboratory shall submit to the Department of Health and Rehabilitative Services a monthly report with statistical information regarding the testing of employees and job applicants. The report shall include information on the methods of analyses conducted, the drugs tested for, the number of positive and negative results for both initial and confirmation tests, and any other information deemed appropriate by the Department of Health and Rehabilitative Services. No monthly report shall identify specific employees or job applicants.

(d) Laboratories shall provide technical assistance to the employer, employee, or job applicant for the purpose of interpreting any positive confirmed test results which could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

(10) Rules.--

(a) The Department of Labor and Employment Security shall adopt rules using rules adopted by the Department of Health and Rehabilitative Services pursuant to s. 112.0455 and criteria established by the National Institute on Drug Abuse as guidelines for modeling the state drug testing program, concerning, but not limited to:

1. Standards for drug testing laboratory licensing and suspension and revocation of a license.
2. Body specimens and minimum specimen amounts which are appropriate for drug testing.
3. Methods of analysis and procedures to ensure reliable drug testing results, including standards for initial tests and confirmation tests.
4. Minimum cutoff detection levels for drugs or their metabolites for the purposes of determining a positive test result.
5. Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens being tested.
6. Retention, storage, and transportation procedures to ensure reliable results on confirmation tests and retests.

(b) This section shall not be construed to eliminate the bargainable rights as provided in the collective bargaining process if applicable.

APPENDIX G
OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT

**PART 40--PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND
ALCOHOL TESTING PROGRAMS**

1. The authority citation for Part 40 is revised to read as follows:
Authority: 49 U.S.C. 102,301,322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.
2. ss40.1 through 40.19 are designated as subpart A and revised to read as follows:

Subpart A--GENERAL

This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employers, including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to, consortia). Employers are responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements of this part.

s40.3 Definitions.

The following definitions apply to this part:

Air blank. A reading by an EBT of ambient air containing no alcohol. (In *7355 EBTs using gas chromatography technology, a reading of the device's internal standard.)

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test use. The consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

Aliquot. A portion of a specimen used for testing.

Blind sample or blind performance test specimen. A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

Breath Alcohol Technician (BAT). An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.

Canceled or invalid test. In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test.

For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test. In alcohol testing, a test that is deemed to be invalid under s40.79. It is neither a positive nor a negative test.

Chain of custody. Procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. With respect to drug testing, that an appropriate drug testing custody form (see s40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

Collection container. A container into which the employee urinates to provide the urine sample used for a drug test.

Collection site. A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection site person. A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

Confirmation (or confirmatory) test. In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

DHHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

DOT agency. An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

Employee. An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.

Employer. An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, employer includes an industry consortium or joint enterprise comprised of two or more employing entities.

EBT (or evidential breath testing device). An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL).

Medical Review Officer (MRO). A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Screening test (or initial test). In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

Secretary. The Secretary of Transportation or the Secretary's designee.

Shipping container. A container capable of being secured with a tamper-evident seal that is used for transfer of one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

Specimen bottle. The bottle that, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

Subpart B--Drug Testing

- 40.21 The drugs.
- 40.23 Preparation for testing.
- 40.25 Specimen collection procedures.
- 40.27 Laboratory personnel.
- 40.29 Laboratory analysis procedures.
- 40.31 Quality assurance and quality control.
- 40.33 Reporting and review of results.
- 40.35 Protection of employee records.
- 40.37 Individual access to test and laboratory certification results.
- 40.39 Use of DHHS--certified laboratories.

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301int., app. 1434nt., app. 2717, app. 1618a.

3. In s40.25, paragraph (f)(10) is revised to read as follows:

s40.25 Specimen collection procedures.

(f)

(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(i)(A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/or Coast Guard may use the "split sample" method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, or Federal Aviation Administration shall use the "split sample" method of collection for those employees.

(ii) Employers using the split sample method of collection shall follow the procedures in this paragraph (f)(10)(ii):

(A) The donor shall urinate into a collection container or a specimen bottle capable of holding at least 60 ml.

(B) If a collection container is used, the collection site person, in the presence of the donor, pours the urine into two specimen bottles. Thirty (30) ml shall be poured into one bottle, to be used as the primary specimen. At least 15 ml shall be poured into the other bottle, to be used as the split specimen.

(C) If a single specimen bottle is used as a collection container, the collection site person shall pour 30 ml of urine from the specimen bottle into a second specimen bottle (to be used as the primary specimen) and retain the remainder (at least 15 ml) in the collection bottle (to be used as the split specimen).

(D) Both bottles shall be shipped in a single shipping container, together with copies 1, 2, and the split specimen copy of the chain of custody form, to the laboratory.

(E) If the test result of the primary specimen is positive, the employee may request that the MRO direct that the split specimen be tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of a verified positive test result.

(F) When the MRO informs the laboratory in writing that the employee has requested a test of the split specimen, the laboratory shall forward, to a different DHHS-approved laboratory, the split specimen bottle, with seal intact, a copy of the MRO request, and the split specimen copy of the

chain of custody form with appropriate chain of custody entries.

(G) The result of the test of the split specimen is transmitted by the second laboratory to the MRO.

(H) Action required by DOT agency regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test of the split specimen.

(I) If the result of the test of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test, and report the cancellation and the reasons for it to the DOT, the employer, and the employee.

(iii) Employers using the single sample collection method shall follow the procedures in paragraph:

(A) The collector may choose to direct the employee to urinate either directly into a specimen bottle or into a separate collection container.

(B) If a separate collection container is used, the collection site person shall pour at least 30 ml of the urine from the collection container into the specimen bottle in the presence of the employee.

(iv) In either collection methodology, upon receiving the specimen from the individual, the collection site person shall determine if it has at least 30 milliliters of urine for the primary or single specimen bottle and, where the split specimen collection method is used, an additional 15 ml of urine for the split specimen bottle. If the individual is unable to provide such a quantity of urine, the collection site person shall instruct the individual to drink not more than 24 ounces of fluids and, after a period of up to two hours, again attempt to provide a complete sample using a fresh collection container. The original insufficient specimen shall be discarded. If the employee is still unable to provide an adequate specimen, the insufficient specimen shall be discarded, testing discontinued, and the employer so notified. The MRO shall refer the individual for a medical evaluation to develop pertinent information concerning whether the individual's inability to provide a specimen is genuine or constitutes a refusal to test. (In preemployment testing, if the employer does not wish to hire the individual, the MRO is not required to make such a referral.) Upon completion of the examination, the MRO shall report his or her conclusions to the employer in writing. * * * * *

4. In s40.29, paragraph (b) (2) is revised and paragraph (b) (3) is added, as follows:

s40.29 Laboratory analysis procedures.

(b)

(2) In situations where the employer uses the split sample collection method, the laboratory shall log in the

split specimen, with the split specimen bottle seal remaining intact. The laboratory shall store this sample securely (see paragraph (c) of this section). If the result of the test of the primary specimen is negative, the laboratory may discard the split specimen. If the result of the test of the primary specimen is positive, the laboratory shall retain the split specimen in frozen storage for 60 days from the date on which the laboratory acquires it (see paragraph (h) of this section). Following the end of the 60-day period, if not informed by the MRO that the employee has requested a test of the split specimen, the laboratory may discard the split specimen.

(3) When directed in writing by the MRO to forward the split specimen to another DHHS-certified laboratory for analysis, the second laboratory shall analyze the split specimen by GC/MS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. Such GC/MS confirmation shall be conducted without regard to the cutoff levels of s40.29(f). The split specimen shall be retained in long-term storage for one year by the laboratory conducting the analysis of the split specimen (or longer if litigation concerning the test is pending).

6. In s40.33 paragraphs (e), (f) and (g) are revised; paragraph (h) is redesignated as paragraphs (i), and a new paragraph (h) is added, as follows:

s40.33 Reporting and review of results.

(e) In a situation in which the employer has used the single sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a reanalysis of the original specimen, if the test is verified positive. If requested to do so by the employee within 72 hours of the employee's having been informed of a verified positive test, the Medical Review Officer shall direct, in writing, a reanalysis of the original sample. The MRO may also direct, in writing, such a reanalysis if the MRO questions the accuracy or validity of any test result. Only the MRO may authorize such a reanalysis, and such a reanalysis may take place only at laboratories certified by DHHS. If the reanalysis fails to reconfirm the presence of the drug or drug metabolite, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer and the employee.

(f) In situations in which the employer uses the split sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a test of the split specimen, if the test is verified as positive. If the employee requests an analysis of the split specimen

within 72 hours of having been informed of a verified positive test, the MRO shall *7357 direct, in writing, the laboratory to provide the split specimen to another DHHS-certified laboratory for analysis. If the analysis of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable, inadequate for testing or untestable, the MRO shall cancel the test and report cancellation and the reasons for it to the DOT, the employer, and the employee.

(g) If an employee has not contacted the MRO within 72 hours, as provided in paragraphs (e) and (f) of this section, the employee may present to the MRO information documenting that serious illness, injury, inability to contact the MRO, lack of actual notice of the verified positive test, or other circumstances unavoidably prevented the employee from timely contacting the MRO. If the MRO concludes that there is a legitimate explanation for the employee's failure to contact the MRO within 72 hours, the MRO shall direct that the reanalysis of the primary specimen or analysis of the split specimen, as applicable, be performed.

(h) When the employer uses the split sample method of collection, the employee is not authorized to request a reanalysis of the primary specimen as provided in paragraph (e) of this section.

7. A new subpart C is added to part 40, to read as follows:

Subpart C--Alcohol Testing

- 40.51 The breath alcohol technician.
- 40.53 Devices to be used for breath alcohol tests.
- 40.55 Quality assurance plans for EBTs.
- 40.57 Locations for breath alcohol testing.
- 40.59 The breath alcohol testing form and log book.
- 40.61 Preparation for breath alcohol testing.
- 40.63 Procedures for screening tests.
- 40.65 Procedures for confirmation tests.
- 40.67 Refusals to test and uncompleted tests.
- 40.69 Inability to provide an adequate amount of breath.
- 40.71 (Reserved)
- 40.73 (Reserved)
- 40.75 (Reserved)
- 40.77 (Reserved)
- 40.79 Invalid Tests.
- 40.81 Availability and disclosure of alcohol testing information about individual employees.
- 40.83 Maintenance and disclosure of records concerning EBTs and BATs.

Appendix A--The Breath Alcohol Testing Form

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

s40.51 The breath alcohol technician.

(a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the EBT he or she is using and in the alcohol testing procedures of this part.

(1) Proficiency shall be demonstrated by successful completion of a course of instruction which, at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath sample, and interpreting and recording EBT results.

(2) Only courses of instruction for operation of EBTs that are equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency. On request, NHTSA will review a BAT instruction course for equivalency.

(3) The course of instruction shall provide documentation that the BAT has demonstrated competence in the operation of the specific EBT(s) he/she will use.

(4) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.

(5) The BAT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

(6) The employer or its agent shall establish documentation of the training and proficiency test of each BAT it uses to test employees, and maintain the documentation as provided in s40.83.

(b) A BAT-qualified supervisor of an employee may conduct the alcohol test for that employee only if another BAT is unavailable to perform the test in a timely manner. A supervisor shall not serve as a BAT for the employee in any circumstance prohibited by a DOT operating administration regulation.

(c) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. In order for a test conducted by such an officer to be accepted under Department of Transportation alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT that was used for the test.

s40.53 Devices to be used for breath alcohol tests.

(a) For screening tests, employers shall use only EBTs. When the employer uses for a screening test an EBT that does not meet the requirements of paragraphs (b) (1) through (3) of this section, the employer shall use a log book in conjunction with the EBT (see s40.59(c)).

(b) For confirmation tests, employers shall use EBTs that meet the following requirements:

(1) EBTs shall have the capability of providing, independently or by direct link to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (b) (2) and (3) of this section.

(2) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employee before each test and being printed out on each copy of the result.

(3) EBTs shall be capable of printing out, on each copy of the result, the manufacturer's name for the device, the device's serial number, and the time of the test.

(4) EBTs shall be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level.

(5) EBTs shall be capable of the following operations:

(i) Testing an air blank prior to each collection of breath; and

(ii) Performing an external calibration check.

s40.55 Quality assurance plans for EBTs.

(a) In order to be used in either screening or confirmation alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.

(1) The plan shall designate the method or methods to be used to perform external calibration checks of the device, using only calibration devices on the NHTSA "Conforming Products List of Calibrating Units for Breath Alcohol Tests."

(2) The plan shall specify the minimum intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use).

(3) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.

(4) The plan shall specify inspection, maintenance, and calibration *7358 requirements and intervals for the device.

(5) For a plan to be regarded as valid, the manufacturer shall have submitted the plan to NHTSA for review and have received NHTSA approval of the plan.

(b) The employer shall comply with the NHTSA-approved quality assurance plan for each EBT it uses for alcohol screening or confirmation testing subject to this part.

(1) The employer shall ensure that external calibration checks of each EBT are performed as provided in the QAP.

(2) The employer shall take an EBT out of service if any external calibration check results in a reading outside the tolerances for the EBT set forth in the QAP. The EBT shall not again be used for alcohol testing under this part until it has been serviced and has had an external calibration check resulting in a reading within the tolerances for the EBT.

(3) The employer shall ensure that inspection, maintenance, and calibration of each EBT are performed by the manufacturer or a maintenance representative certified by the device's manufacturer or a state health agency or other appropriate state agency. The employer shall also ensure that each BAT or other individual who performs an external calibration check of an EBT used for alcohol testing subject to this part has demonstrated proficiency in conducting such a check of the model of EBT in question.

(4) The employer shall maintain records of the external calibration checks of EBTs as provided in s40.83.

(c) When the employer is not using the EBT at an alcohol testing site, the employer shall store the EBT in a secure space.

s40.57 Locations for breath alcohol testing.

(a) Each employer shall conduct alcohol testing in a location that affords visual and aural privacy to the individual being tested, sufficient to prevent unauthorized persons from seeing or hearing test results. All necessary equipment, personnel, and materials for breath testing shall be provided at the location where testing is conducted.

(b) An employer may use a mobile collection facility (e.g., a van equipped for alcohol testing) that meets the requirements of paragraph (a) of this section.

(c) No unauthorized persons shall be permitted access to the testing location when the EBT remains unsecured or, in order to prevent such persons from seeing or hearing a testing result, at any time when testing is being conducted.

(d) In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet the requirements of paragraph (a) of this section. In such a case, the employer or BAT shall provide visual and aural privacy to the employee to the greatest extent practicable.

(e) The BAT shall supervise only one employee's use of the EBT at a time. The BAT shall not leave the alcohol testing location while the testing procedure for a given employee (see ss40.61 through 40.65) is in progress.

s40.59 The breath alcohol testing form and log book.

(a) Each employer shall use the breath alcohol testing form prescribed under this part. The form is found in appendix A to this subpart. Employers may not modify or revise this form, except that a form directly generated by an EBT may omit the space for affixing a separate printed result to the form.

(b) The form shall provide triplicate (or three consecutive identical) copies. Copy 1 (white) shall be retained by the BAT. Copy 2 (green) shall be provided to the employee. Copy 3 (blue) shall be transmitted to the employer. Except for a form generated by an EBT, the form shall be 8 1/2 by 11 inches in size.

(c) A log book shall be used in conjunction with any EBT used for screening tests that does not meet the requirements of s40.53(b) (1) through (3). There shall be a log book for each such device, that is not used in conjunction with any other device and that is used to record every test conducted on the device. The log book shall include columns for the test number, date of the test, name of the BAT, location of the test, quantified test result, and initials of the employee taking each test.

s40.61 Preparation for breath alcohol testing.

(a) When the employee enters the alcohol testing location, the BAT will require him or her to provide positive identification (e.g., through use of a photo I.D. card or identification by an employer representative). On request by the employee, the BAT shall provide positive identification to the employee.

(b) The BAT shall explain the testing procedure to the employee.

s40.63 Procedures for screening tests.

(a) The BAT shall complete Step 1 on the Breath Alcohol Testing Form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test.

(b) An individually-sealed mouthpiece shall be opened in view of the employee and BAT and attached to the EBT in accordance with the manufacturer's instructions.

(c) The BAT shall instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained.

(d)(1) If the EBT does not meet the requirements of s40.53(b)(1) through (3), the BAT and the employee shall take the following steps:

(i) Show the employee the result displayed on the EBT. The BAT shall record the displayed result, test number,

testing device, serial number of the testing device, time and quantified result in Step 3 of the form.

(ii) Record the test number, date of the test, name of the BAT, location, and quantified test result in the log book. The employee shall initial the log book entry.

(2) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(3) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(e) (1) In any case in which the result of the screening test is a breath alcohol concentration of less than 0.02, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign or initial in the "Remarks" section of the form.

(3) If a test result printed by the EBT (see paragraph (d) (2) or (d) (3) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with s40.79, the test is invalid and the employer and employee shall be so advised.

(4) No further testing is authorized. The BAT shall transmit the result of less than 0.02 to the employer in a confidential manner, and the employer shall receive and store the information so as to ensure that confidentiality is maintained as required by s40.81.

(f) If the result of the screening test is an alcohol concentration of 0.02 or greater, a confirmation test shall be performed as provided in s40.65.

(g) If the confirmation test will be conducted by a different BAT, the BAT who conducts the screening test shall complete and sign the form and log book entry. The BAT will provide the employee with Copy 2 of the form.

s40.65 Procedures for confirmation tests.

(a) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall follow the procedures of s40.61.

(b) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth,

and, to the extent possible, not belch during a waiting period before the confirmation test. This time period begins with the completion of the screening test, and shall not be less than 15 minutes. The confirmation test shall be conducted within 20 minutes of the completion of the screening test. The BAT shall explain to the employee the reason for this requirement (i.e., to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee's benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the "Remarks" section of the form.

(c) (1) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall initiate a new Breath Alcohol Testing form. The BAT shall complete Step 1 on the form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test. The BAT shall note in the "Remarks" section of the form that a different BAT conducted the screening test.

(2) In all cases, the procedures of s40.63 (a), (b), and (c) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) Before the confirmation test is administered for each employee, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the reading is greater than 0.00, the BAT shall conduct one more air blank. If the reading is greater than 0.00, testing shall not proceed using that instrument. However, testing may proceed on another instrument.

(e) Any EBT taken out of service because of failure to perform an air blank accurately shall not be used for testing until a check of external calibration is conducted and the EBT is found to be within tolerance limits.

(f) In the event that the screening and confirmation test results are not identical, the confirmation test result is deemed to be the final result upon which any action under operating administration rules shall be based.

(g) (1) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(2) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(h) (1) Following the completion of the test, the BAT shall date the form and sign the certification in Step 3 of

the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign or initial in the "Remarks" section of the form.

(3) If a test result printed by the EBT (see paragraph (g)(1) or (g)(2) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with s40.79, the test is invalid and the employer and employee shall be so advised.

(4) The BAT shall conduct an air blank. If the reading is greater than 0.00, the test is invalid.

(i) The BAT shall transmit all results to the employer in a confidential manner.

(1) Each employer shall designate one or more employer representatives for the purpose of receiving and handling alcohol testing results in a confidential manner. All communications by BATs to the employer concerning the alcohol testing results of employees shall be to a designated employer representative.

(2) Such transmission may be in writing, in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the employer of results that require the employer to prevent the employee from performing a safety-sensitive function.

(3) If the initial transmission is not in writing (e.g., by telephone), the employer shall establish a mechanism to verify the identity of the BAT providing the information.

(4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the employer the employer's copy of the breath alcohol testing form. The employer shall store the information so as to ensure that confidentiality is maintained as required by s40.81.

s40.67 Refusals to test and uncompleted tests.

(a) Refusal by an employee to complete and sign the breath alcohol testing form (Step 2), to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the testing process in a way that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The testing process shall be terminated and the BAT shall immediately notify the employer.

(b) If a screening or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new screening

or confirmation test, as applicable, using a new breath alcohol testing form with a new sequential test number (in the case of a screening test conducted on an EBT that meets the requirements of s40.53(b) or in the case of a confirmation test).

s40.69 Inability to provide an adequate amount of breath.

(a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.

(b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the employer.

(c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the "Remarks" section of the breath alcohol testing form and immediately inform the employer.

(d) If the employee attempts and fails to provide an adequate amount of breath, the employer shall proceed as follows:

(1) (Reserved)

(2) The employer shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the employer concerning the employee's medical ability to provide an adequate amount of breath.

(i) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the employer a written statement of the basis for his or her conclusion.

(ii) If the licensed physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (d)(2)(i) of this section the employee's failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for his or her conclusion to the employer.

ss40.71-40.77 (Reserved)

s40.79 Invalid tests.

(a) A breath alcohol test shall be invalid under the following circumstances:

(1) The next external calibration check of an EBT produces a result that differs by more than the tolerance

stated in the QAP from the known value of the test standard. In this event, every test result of 0.02 or above obtained on the device since the last valid external calibration check shall be invalid;

(2) The BAT does not observe the minimum 15-minute waiting period prior to the confirmation test, as provided in s40.65(b);

(3) The BAT does not perform an air blank of the EBT before a confirmation test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test, as provided in s40.65;

(4) The BAT does not sign the form as required by ss40.63 and 40.65;

(5) The BAT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording or printing on or attachment to the form of the test result;

(6) An EBT fails to print confirmation test result; or

(7) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

(b) (Reserved)

s40.81 Availability and disclosure of alcohol testing information about individual employees.

(a) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(b) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in the records required to be maintained by this part or by DOT agency alcohol misuse rules.

(c) An employee subject to testing is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(d) Each employer shall permit access to all facilities utilized in complying with the requirements of this part and DOT agency alcohol misuse rules to the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations).

(e) When requested by the Secretary of Transportation, any DOT agency with regulatory authority over the employer,

or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations), each employer shall make available copies of all results for employer alcohol testing conducted under the requirements of this part and any other information pertaining to the employer's alcohol misuse prevention program. The information shall include name-specific alcohol test results, records and reports.

(f) When requested by the National Transportation Safety Board as part of an accident investigation, an employer shall disclose information related to the employer's administration of any post-accident alcohol tests administered following the accident under investigation.

(g) An employer shall make records available to a subsequent employer upon receipt of a written request from a covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's written request.

(h) An employer may disclose information required to be maintained under this part pertaining to a covered employee to that employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under the requirements of this part, or from the employer's determination that the employee engaged in conduct prohibited by a DOT agency alcohol misuse regulation (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(i) An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information is permitted only in accordance with the terms of the employee's consent.

s40.83 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer or its agent shall maintain the following records for two years:

(1) Records of the inspection and maintenance of each EBT used in employee testing;

(2) Documentation of the employer's compliance with the QAP for each EBT it uses for alcohol testing under this part;

(3) Records of the training and proficiency testing of each BAT used in employee testing;

(4) The log books required by s40.59(c).

(b) Each employer or its agent shall maintain for five years records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.

(c) Records required to be maintained by this section shall be disclosed on the same basis as provided in s40.81.

**Appendix A to Subpart C of Part 40--The Breath Alcohol
Testing Form**

APPENDIX H
MANDATORY GUIDELINES FOR
FEDERAL WORKPLACE
DRUG TESTING PROGRAMS

**MANDATORY GUIDELINES FOR
FEDERAL WORKPLACE DRUG TESTING PROGRAMS**

59 FR 29908

Thursday, June 9, 1994

EFFECTIVE DATE: September 1, 1994.

FOR FURTHER INFORMATION CONTACT: Dr. Donna M. Bush, Chief, Drug Testing Section, Division of Workplace Programs, Substance Abuse and Mental Health Services Administration (SAMHSA), room 9A-53, 5600 Fishers Lane, Rockville, Maryland 20857, tel. (301) 443-6014.

SUPPLEMENTARY INFORMATION: The Department is revising the guidelines entitled "Mandatory Guidelines for Federal Workplace Drug Testing Programs," (Mandatory Guidelines) which were initially published in the Federal Register on April 11, 1988 (53 FR 11979). These Mandatory Guidelines and the revisions are developed in accordance with Executive Order No. 12564 dated September 15, 1986, and section 503 of Public Law 100-71, 5 U.S.C. section 7301 note, the Supplemental Appropriations Act for fiscal year 1987 dated July 11, 1987. The revisions to the Mandatory Guidelines incorporate changes based on the comments submitted and the Department's first 5 years of experience in implementing and administering these Guidelines.

The Mandatory Guidelines as revised are hereby adopted in accordance with Executive Order 12564 and section 503 of Pub. L. 100-71. For the public's convenience the Mandatory Guidelines as revised are set out in full as follows:

Subpart A--General

- 1.1 Applicability.
- 1.2 Definitions.
- 1.3 Future Revisions.

Subpart B--Scientific and Technical Requirements

- 2.1 The Drugs.
- 2.2 Specimen Collection Procedures.
- 2.3 Laboratory Personnel.
- 2.4 Laboratory Analysis Procedures.
- 2.5 Quality Assurance and Quality Control.
- 2.6 Reporting and Review of Results.
- 2.7 Protection of Employee Records.
- 2.8 Individual Access to Test and Laboratory Certification Results.

Subpart C--Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies

- 3.1 Introduction.
- 3.2 Goals and Objectives of Certification.
- 3.3 General Certification Requirements.
- 3.4 Capability to Test for Five Classes of Drugs.
- 3.5 Initial and Confirmatory Capability at Same Site.
- 3.6 Personnel.
- 3.7 Quality Assurance and Quality Control.
- 3.8 Security and Chain of Custody.
- 3.9 One-Year Storage for Confirmed Positives.
- 3.10 Documentation.
- 3.11 Reports.
- 3.12 Certification.
- 3.13 Revocation.
- 3.14 Suspension.
- 3.15 Notice.
- 3.16 Recertification.
- 3.17 Performance Testing (PT) Requirement for

Certification.

- 3.18 Performance Test Samples Composition.
- 3.19 Evaluation of Performance Testing.
- 3.20 Inspections.
- 3.21 Results of Inadequate Performance.
- 3.22 Listing of Certified Laboratories.

Subpart D--Procedures for Review of Suspension or Proposed Revocation of a Certified Laboratory

- 4.1 Applicability.
- 4.2 Definitions.
- 4.3 Limitations on Issues Subject to Review.
- 4.4 Specifying Who Represents the Parties.
- 4.5 The Request for Informal Review and the Reviewing Official's Response.
- 4.6 Abeyance Agreement.
- 4.7 Preparation of the Review File and Written Argument.
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- 4.10 Ex Parte Communications.
- 4.11 Transmission of Written Communications by Reviewing Official and Calculation of Deadlines.
- 4.12 Authority and Responsibilities of Reviewing Official.
- 4.13 Administrative Record.
- 4.14 Written Decision.
- 4.15 Court Review of Final Administrative Action; Exhaustion of Administrative Remedies.

Authority: E.O. 12564 and Sec. 503 of Pub. L. 100-71.

Subpart A--General

Section 1.1 Applicability.

(a) These mandatory guidelines apply to:

(1) Executive Agencies as defined in 5 U.S.C. 105;

(2) The Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the Armed Forces as defined in 5 U.S.C. 2101(2));

(3) And any other employing unit or authority of the Federal Government except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(b) Subpart C of these Guidelines (which establishes laboratory certification standards) applies to any laboratory which has or seeks certification to perform urine drug testing for Federal agencies under a drug testing program conducted under E.O. 12564. Only laboratories certified under these standards are authorized to perform urine drug testing for Federal agencies.

(c) The Intelligence Community, as defined by Executive Order No. 12333, shall be subject to these Guidelines only to the extent agreed to by the head of the affected agency.

(d) These Guidelines do not apply to drug testing conducted under legal authority other than E.O. 12564, including testing of persons in the criminal justice system, such as arrestees, detainees, probationers, incarcerated persons, or parolees.

(e) Agencies may not deviate from the provisions of these Guidelines without the written approval of the Secretary. In requesting approval for a deviation, an agency must petition the Secretary in writing and describe the specific provision or provisions for which a deviation is sought and the rationale therefor. The Secretary may approve the request upon a finding of good cause as determined by the Secretary.

(f) Agencies shall purchase drug testing services only from laboratories certified by HHS or an HHS- recognized certification program in accordance with these Guidelines.

Section 1.2 Definitions

For purposes of these Guidelines the following definitions are adopted:

Aliquot. A fractional part of a specimen used for testing. It is taken as a sample representing the whole specimen.

Calibrator. A solution of known concentration used to calibrate a measurement procedure or to compare the response obtained with the response of a test specimen/sample. The concentration of the analyte of interest in the calibrator is known within limits ascertained during its preparation. Calibrators may be used to establish a calibration curve over a range of interest.

Certifying Scientist. An individual with at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent who reviews all pertinent data and quality control results. The individual shall have training and experience in the theory and practice of all methods and procedures used in the laboratory, including a thorough understanding of chain of custody procedures, quality control practices, and analytical procedures relevant to the results that the individual certifies. Relevant training and experience shall also include the review, interpretation, and reporting of test results; maintenance of chain of custody; and proper remedial action to be taken in response to test systems being out of control-limits or detecting aberrant test or quality control results.

Chain of Custody. Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an Office of Management and Budget (OMB) approved specimen chain of custody form be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account for the specimens and samples within the laboratory. Chain of custody forms shall, at a minimum, include an entry documenting date and purpose each time a specimen or sample is handled or transferred and identifying every individual in the chain of custody.

Collection Site. A place designated by the agency where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection Site Person. A person who instructs and assists individuals at a collection site and who receives and makes an initial examination of the urine specimen provided by those individuals. A collection site person shall have successfully completed training to carry out this function.

Confirmatory Test. A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (At this time gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Control. A sample used to monitor the status of an analysis to maintain its performance within desired limits.

Donor. The individual from whom a urine specimen is collected. **Initial Test (also known as Screening Test).** An immunoassay test to eliminate "negative" urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation or further testing.

Laboratory Chain of Custody Form. The form(s) used by the testing laboratory to document the security of the specimen and all aliquots of the specimens during testing and storage by the laboratory. The form, which may account for an entire laboratory test batch, shall include the names and signatures of all individuals who accessed the specimens or aliquots and the date and purpose of the access.

Medical Review Officer (MRO). A licensed physician responsible for receiving laboratory results generated by an agency's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information.

Quality Control Sample. A sample used to evaluate whether or not the analytical procedure is operating within predefined tolerance limits. Calibrators, controls, negative urine samples, and blind samples are collectively referred to as "quality control samples" and each as a "sample."

Reason to Believe. Reason to believe that a particular individual may alter or substitute the urine specimen as provided in section 4(c) of E.O. 12564.

Sample. A representative portion of a urine specimen or quality control sample used for testing.

Secretary. The Secretary of Health and Human Services or the Secretary's designee. The Secretary's designee may be a contractor or other recognized organization which acts on behalf of the Secretary in implementing these Guidelines.

Specimen. The portion of urine that is collected from a donor. Specimen Chain of Custody Form. An OMB approved form used to document the security of the specimen from time of collection until receipt by the laboratory. This form, at a minimum, shall include specimen identifying information, date and location of collection, name and signature of collector, name of testing laboratory, and the names and signatures of all individuals who had custody of the specimen from time of collection until the specimen was prepared for shipment to the laboratory.

Standard. A reference material of known purity or a solution containing a reference material at a known concentration.

Section 1.3 Future Revisions

In order to ensure the full reliability and accuracy of drug assays, the accurate reporting of test results, and the integrity and efficacy of Federal drug testing programs, the Secretary may make changes to these Guidelines to reflect improvements in the available science and technology. These changes will be published in final as a notice in the Federal Register.

Subpart B--Scientific and Technical Requirements

Section 2.1 The Drugs

(a) The President's Executive Order 12564 defines "illegal drugs" as those included in Schedule I or II of the Controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as otherwise authorized by law. Hundreds of drugs are covered under Schedule I and II and while it is not feasible to test routinely for all of them, Federal drug testing programs shall test for drugs as follows:

(1) Federal agency applicant and random drug testing programs shall at a minimum test for marijuana and cocaine;

(2) Federal agency applicant and random drug testing programs are also authorized to test for opiates, amphetamines, and phencyclidine; and

(3) When conducting reasonable suspicion, accident, or unsafe practice testing, a Federal agency may test for any drug listed in Schedule I or II of the CSA.

(b) Any agency covered by these guidelines shall petition the Secretary in writing for approval to include in its testing protocols any drugs (or classes of drugs) not listed for Federal agency testing in paragraph (a) of this section. Such approval shall be limited to the use of the appropriate science and technology and shall not otherwise limit agency discretion to test for any drugs covered under Schedule I or II of the CSA.

(c) Urine specimens collected pursuant to Executive Order 12564, Public Law 100-71, and these Guidelines shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law except if additional testing is required to determine the validity of the specimen. Urine that tests negative by initial or confirmatory testing may, however, be pooled for use in the laboratory's internal quality control program.

(d) These Guidelines are not intended to limit any agency which is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees or employees in its regulated industries.

Section 2.2 Specimen Collection Procedures

(a) Designation of Collection Site. Each agency drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory.

(b) Security. Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the

facility used for testing shall be secured during drug testing.

(c) Chain of Custody. Chain of custody standardized forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) Access to Authorized Personnel Only. No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

(e) Privacy. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular donor may alter or substitute the specimen to be provided.

(f) Integrity and Identity of Specimen. Agencies shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and on the specimen chain of custody form can identify the donor from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(2) When a donor arrives at the collection site, the collection site person shall request the donor to present photo identification. If the donor does not have proper photo identification, the collection site person shall contact the supervisor of the donor, the coordinator of the drug testing program, or any other agency official who can positively identify the donor. If the donor's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the donor fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the donor to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the donor's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The donor may retain his or her wallet.

(5) The donor shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the donor shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent, or any other materials which could be used to adulterate the specimen.

(7) The collection site person shall give the donor a clean specimen bottle or specimen container. The donor may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance on the specimen chain of custody form.

(9) In the exceptional event that an agency-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A person of the same gender as the donor shall accompany the donor into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the donor not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the donor will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the donor, the collection site person shall determine the volume of urine in the specimen bottle/container. (i) If the volume is greater than 30 milliliters (mL), the collection site person will proceed with step (11) below. (ii) If the volume is less than 30 mL and the temperature is within the acceptable range specified in step (13) below, the specimen is discarded and a second specimen shall be collected. The donor may be given a reasonable amount of liquid to drink for this purpose (e.g., an 8 oz glass of water every 30 min, but not to exceed a maximum of 24 oz). If the donor fails for any reason to provide 30 mL of urine for the second specimen collected, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken. (iii) If the volume is less than 30 mL and the temperature is outside the acceptable range specified in step (13) below, a second specimen shall be collected using the procedure specified in step (13) below.

(11) After the specimen has been provided and submitted to the collection site person, the donor shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure only the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(13) If the temperature of the specimen is outside the range of 32degrees-38 degreesC/90degrees-100 degreesF, that is a reason to believe that the donor may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a person of the same gender and both specimens shall be forwarded to the laboratory for testing. The agency shall select the observer if there is no collection site person of the same gender available. A donor may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the donor may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted on the specimen chain of custody form.

(15) All specimens suspected of being adulterated or diluted shall be forwarded to the laboratory for testing.

(16) When there is any reason to believe that a donor may have altered or substituted the specimen to be provided, another specimen shall be obtained as soon as possible under the direct observation of a person of the same gender and both specimens shall be forwarded to the laboratory for testing. The agency shall select the observer if there is no collection site person of the same gender available.

(17) Both the donor and the collection site person shall keep the specimen bottle/container in view at all times prior to its being sealed and labeled. If the specimen is transferred from a specimen container to a specimen bottle, the collection site person shall request the donor to observe the transfer of the specimen and the placement of the tamper-evident seal/tape on the bottle. The tamper-evident seal may be in the form of evidence tape, a self-sealing bottle cap with both a tamper-evident seal and unique coding, cap and bottle systems that can only be sealed one time, or any other system that ensures any tampering with the specimen will be evident to laboratory personnel during the accessioning process.

(18) The collection site person and the donor shall be present at the same time during procedures outlined in paragraphs (f)(19)-(f)(22) of this section.

(19) The collection site person shall place securely on the specimen bottle an identification label which contains the date, the donor's specimen number, and any other

identifying information provided or required by the agency.

(20) The donor shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter on the specimen chain of custody form all information identifying the specimen.

(22) The donor shall be asked to read and sign a statement on the specimen chain of custody form certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(23) Based on a reason to believe that the donor may alter or substitute the specimen to be provided, a higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under direct observation. The person directly observing the specimen collection shall be of the same gender. The agency shall select the observer if there is no collection site person of the same gender available.

(24) The collection site person shall complete the specimen chain of custody form.

(25) The urine specimen and specimen chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the urine specimen and specimen chain of custody form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(g) Collection Control. To the maximum extent possible, collection site personnel shall keep the donor's specimen bottle within sight both before and after the donor has urinated. After the specimen is collected, it shall be properly sealed and labeled. A specimen chain of custody form shall be used for maintaining control and accountability of each specimen. The date and purpose shall be documented on a specimen chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) Split Specimens. An agency may, but is not required to, use a split specimen method of collection. If the urine specimen is split into two specimen bottles (hereinafter referred to as Bottle A and Bottle B) the following procedure shall be used:

(1) The donor shall urinate into either a specimen bottle or specimen container. The collection site person, in the presence of the donor, after determining specimen temperature, pours the urine into two specimen bottles that are labeled Bottle A and Bottle B or, if Bottle A was used to collect the specimen, pours an appropriate amount into Bottle B. A minimum of 45 mL of urine is required when using a split specimen procedure, i.e., 30 mL for Bottle A and 15 mL for Bottle B.

(2) The Bottle A specimen, containing a minimum of 30 mL of urine, is to be used for the drug test. If there is no additional urine available for the second specimen bottle (Bottle B), the first specimen bottle (Bottle A) shall nevertheless be processed for testing.

(3) A minimum of 15 mL of urine shall be poured into the second specimen bottle (Bottle B).

(4) All requirements of this part shall be followed with respect to Bottle A and Bottle B, including the requirements that a copy of the chain of custody form accompany each bottle processed under split sample procedures.

(5) The collection site shall send the split specimens (Bottle A and Bottle B) at the same time to the laboratory that will be testing the Bottle A specimen.

(6) If the test of the first specimen bottle (Bottle A) is verified positive by the MRO, the MRO shall report the result to the agency. Only the donor may request through the MRO that the second specimen bottle (Bottle B) be tested in an HHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the first specimen bottle (Bottle A). The MRO shall honor such a request if it is made within 72 hours of the donor's having received notice that he or she tested positive. The result of this test is transmitted to the MRO without regard to the cutoff levels used to test the first specimen bottle (Bottle A).

(7) Any action taken by a Federal agency as a result of an MRO verified positive drug test (e.g., removal from performing a safety-sensitive function) may proceed whether Bottle B is or is not tested.

(8) If the result of the test on the second specimen bottle (Bottle B) fails to reconfirm the result reported for Bottle A, the MRO shall void the test result for Bottle A and the donor shall re-enter the group subject to random testing as if the test had not been conducted. The MRO shall notify the Federal agency when a failed to reconfirm has occurred and the agency shall contact the Secretary. The Secretary will investigate the failed to reconfirm result and attempt to determine the reason for the inconsistent results between Bottle A and Bottle B. HHS will report its findings to the agency including recommendations and/or actions taken to prevent the recurrence of the failed to reconfirm result.

(i) Transportation to Laboratory. Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, for example, specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. The collection site personnel shall ensure that the specimen chain of custody form is enclosed within each container sealed for shipment to the drug testing laboratory. Since specimens are sealed in packages that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the package during transit.

Section 2.3 Laboratory Personnel

(a) Day-to-Day Management.

(1) The laboratory shall have a responsible person (RP) to assume professional, organizational, educational, and administrative responsibility for the laboratory's urine drug testing facility.

(2) This individual shall have documented scientific qualifications in analytical forensic toxicology. Minimum qualifications are: (i) Certification as a laboratory director by the State in forensic or clinical laboratory toxicology; or (ii) A Ph.D. in one of the natural sciences with an adequate undergraduate and graduate education in biology, chemistry, and pharmacology or toxicology; or (iii) Training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree with additional training and laboratory/research experience in biology, chemistry, and pharmacology or toxicology; and (iv) In addition to the requirements in (i), (ii), and (iii) above, minimum qualifications also require: (A) Appropriate experience in analytical forensic toxicology including experience with the analysis of biological material for drugs of abuse, and (B) Appropriate training and/or experience in forensic applications of analytical toxicology, e.g., publications, court testimony, research concerning analytical toxicology of drugs of abuse, or other factors which qualify the individual as an expert witness in forensic toxicology.

(3) This individual shall be engaged in and responsible for the day-to-day management of the drug testing laboratory even where another individual has overall responsibility for an entire multispecialty laboratory.

(4) This individual shall be responsible for ensuring that there are enough personnel with adequate training and experience to supervise and conduct the work of the drug testing laboratory. He or she shall assure the continued competency of laboratory personnel by documenting their

inservice training, reviewing their work performance, and verifying their skills.

(5) This individual shall be responsible for the laboratory's having a procedure manual which is complete, up-to-date, available for personnel performing tests, and followed by those personnel. The procedure manual shall be reviewed, signed, and dated by this responsible person whenever procedures are first placed into use or changed or when a new individual assumes responsibility for management of the drug testing laboratory. Copies of all procedures and dates on which they are in effect shall be maintained. (Specific contents of the procedure manual are described in section 2.4(n)(1))

(6) This individual shall be responsible for maintaining a quality assurance program to assure the proper performance and reporting of all test results; for maintaining acceptable analytical performance for all controls and standards; for maintaining quality control testing; and for assuring and documenting the validity, reliability, accuracy, precision, and performance characteristics of each test and test system.

(7) This individual shall be responsible for taking all remedial actions necessary to maintain satisfactory operation and performance of the laboratory in response to quality control systems not being within performance specifications, errors in result reporting or in analysis of performance testing results. This individual shall ensure that sample results are not reported until all corrective actions have been taken and he or she can assure that the results provided are accurate and reliable.

(b) Certifying Test Results. The laboratory's urine drug testing facility shall have a certifying scientist(s), as defined in section 1.2, who reviews all pertinent data and quality control *29921 results in order to attest to the validity of the laboratory's test reports. A laboratory may designate certifying scientists that are qualified to certify only results that are negative on the initial test and certifying scientists that are qualified to certify both initial and confirmatory tests.

(c) Day-to-Day Operations and Supervision of Analysts. The laboratory's urine drug testing facility shall have an individual(s) to be responsible for day-to-day operations and to supervise the technical analysts. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the laboratory, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; maintenance of chain of custody; and proper remedial actions to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

(d) Other Personnel. Other technicians or nontechnical staff shall have the necessary training and skills for the tasks assigned.

(e) Training. The laboratory's urine drug testing program shall make available continuing education programs to meet the needs of laboratory personnel.

(f) Files. Laboratory personnel files shall include: resume of training and experience; certification or license, if any; references; job descriptions; records of performance evaluation and advancement; incident reports; and results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate.

Section 2.4 Laboratory Analysis Procedures

(a) Security and Chain of Custody.

(1) Drug testing laboratories shall be secure at all times. They shall have in place sufficient security measures to control access to the premises and to ensure that no unauthorized personnel handle specimens or gain access to the laboratory processes or to areas where records are stored. Access to these secured areas shall be limited to specifically authorized individuals whose authorization is documented. With the exception of personnel authorized to conduct inspections on behalf of Federal agencies for which the laboratory is engaged in urine testing or on behalf of the Secretary or emergency personnel (e.g., firefighters and medical rescue teams), all authorized visitors and maintenance and service personnel shall be escorted at all times. The laboratory shall maintain a record that documents the dates, time of entry and exit, and purpose of entry of authorized visitors, maintenance, and service personnel accessing secured areas.

(2) Laboratories shall use chain of custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results, during storage, and continuing until final disposition of specimens. The date and purpose shall be documented on an appropriate chain of custody form each time a specimen is handled or transferred, and every individual in the chain shall be identified. Accordingly, authorized technicians shall be responsible for each urine specimen or aliquot in their possession and shall sign and complete chain of custody forms for those specimens or aliquots as they are received.

(b) Receiving.

(1) When a shipment of specimens is received, laboratory personnel shall inspect each package for evidence of possible tampering and compare information on specimen bottles within each package to the information on the accompanying chain of custody forms. Any direct evidence of tampering or discrepancies in the information on specimen bottles and the specimen chain of custody forms

attached to the shipment shall be immediately reported to the agency and shall be noted on the specimen chain of custody forms which shall accompany the specimens while they are in the laboratory's possession.

(2) Specimen bottles will normally be retained within the laboratory's accession area until all analyses have been completed. Aliquots and laboratory chain of custody forms shall be used by laboratory personnel for conducting initial and confirmatory tests while the original specimen and specimen chain of custody form remain in secure storage.

(c) Short-Term Refrigerated Storage. Specimens that do not receive an initial test within 7 days of arrival at the laboratory shall be placed in secure refrigeration units. Temperatures shall not exceed 6degreesC. Emergency power equipment shall be available in case of prolonged power failure.

(d) Specimen Processing. Laboratory facilities for urine drug testing will normally process specimens by grouping them into batches. The number of specimens in each batch may vary significantly depending on the size of the laboratory and its workload. When conducting either initial or confirmatory tests, every batch shall satisfy the quality control requirements in sections 2.5 (b) and (c), respectively.

(e) Initial Test.

(1) The initial test shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The following initial cutoff levels shall be used when screening specimens to determine whether they are negative for these five drugs or classes of drugs:

	Initial test level (ng/mL)
Marijuana metabolites	50
Cocaine metabolites	300
Opiate metabolites	300
Phencyclidine	25
Amphetamines	1,000

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. The agency requesting the authorization to include other drugs shall submit to the Secretary in writing the agency's proposed initial test methods, testing levels, and proposed performance test program.

(3) Specimens that test negative on all initial immunoassay tests will be reported negative. No further testing of these negative specimens for drugs is permitted and the specimens shall either be discarded or pooled for use in the laboratory's internal quality control program.

(4) Multiple initial tests (also known as rescreening) for the same drug or drug class may be performed provided that all tests meet all Guideline cutoffs and quality control requirements (see section 2.5(b)). Examples: a test is performed by immunoassay technique "A" for all drugs using the HHS cutoff levels, but presumptive positive amphetamines are forwarded for immunoassay technique "B" to eliminate any possible presumptive positives due to structural analogues; a valid analytical result cannot be obtained using immunoassay technique "A" and immunoassay technique "B" is used in an attempt to obtain a valid analytical result.

(f) Confirmatory Test.

(1) All specimens identified as positive on the initial test shall be confirmed for the class(es) of drugs screened positive on the initial test using gas chromatography/mass spectrometry (GC/MS) at the cutoff values listed in this paragraph. All confirmations shall be by quantitative analysis. Concentrations which exceed the linear region of the standard curve shall be documented in the laboratory record as "exceeds the linear range of the test."

Confirmatory test level (ng/mL)

Marijuana metabolite [FN1]	15
Cocaine metabolite [FN2]	150
Opiates:	
Morphine.....	300
Codeine	300
Phencyclidine.....	25
Amphetamines: Amphetamine	500
Methamphetamine	500

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. The agency requesting the authorization to include other drugs shall submit to the Secretary in writing the agency's proposed confirmatory test methods, testing levels, and proposed performance test program.

(3) Specimens that test negative on confirmatory tests shall be reported negative. No further testing of these specimens for drugs is permitted and the specimens shall either be discarded or pooled for use in the laboratory's internal quality control program.

(g) Reporting Results.

(1) The laboratory shall report test results to the agency's MRO within an average of 5 working days after receipt of the specimen by the laboratory. Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by a

certifying scientist who satisfies the requirements described by the definition in section 1.2. The report shall identify the drugs/metabolites tested for, whether positive or negative, and the cutoff for each, the specimen number assigned by the agency, and the drug testing laboratory specimen identification number.

(2) Except as otherwise provided by this subsection, the laboratory shall report as negative all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive shall be reported positive for a specific drug. For amphetamines, to report a specimen positive for methamphetamine only, the specimen must also contain amphetamine at a concentration equal to or greater than 200 ng/mL by the confirmatory test. If this criterion is not met, the specimen must be reported as negative for methamphetamine.

(3) The MRO may request from the laboratory and the laboratory shall provide quantitation of test results. The MRO may not disclose quantitation of test results to the agency but shall report only whether the test was positive or negative.

(4) The laboratory may transmit results to the MRO by various electronic means (for example, teleprinters, facsimile, or computer) in a manner designed to ensure confidentiality of the information. Results may not be provided verbally by telephone. The laboratory must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.

(5) The laboratory shall send only to the MRO a certified copy of the original chain of custody form signed by a certifying scientist.

(6) The laboratory shall provide to the agency official responsible for coordination of the drug-free workplace program a monthly statistical summary of urinalysis testing of Federal employees and shall not include in the summary any personal identifying information. Initial and confirmation data shall be included from test results reported within that month. Normally this summary shall be forwarded by registered or certified mail not more than 14 calendar days after the end of the month covered by the summary. The summary shall contain the following information:

Initial Testing:

(i) Number of specimens received;

(ii) Number of specimens reported out; and (iii)

Number of specimens screened positive for: Marijuana metabolites, Cocaine metabolites, Opiate metabolites, Phencyclidine, and Amphetamines.

Confirmatory Testing:

- (i) Number of specimens received for confirmation;
- (ii) Number of specimens confirmed positive for:
Marijuana metabolite, Cocaine metabolite, Morphine,
codeine, Phencyclidine, Amphetamine, and Methamphetamine.

(7) The laboratory shall make available copies of all analytical results for Federal drug testing programs when requested by HHS or any Federal agency for which the laboratory is performing drug testing services.

(8) Unless otherwise instructed by the agency in writing, all records pertaining to a given urine specimen shall be retained by the drug testing laboratory for a minimum of 2 years.

(h) Long- Term Storage. Long-term frozen storage (20 degreesC or less) ensures that positive urine specimens will be available for any necessary retest. Unless otherwise authorized in writing by the agency, drug testing laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive. Within this 1-year period an agency may request the laboratory to retain the specimen for an additional period of time. If no such request is received, the laboratory may discard the specimen after the end of 1 year, except that the laboratory shall be required to maintain any specimens under legal challenge for an indefinite period.

(i) Retesting of a Specimen (i.e., the reanalysis by gas chromatography/mass spectrometry of a specimen previously reported positive or the testing of Bottle B of a split specimen collection). Because some analytes deteriorate or are lost during freezing and/or storage, quantitation for a retest is not subject to a specific cutoff requirement but must provide data sufficient to confirm the presence of the drug or metabolite.

(j) Subcontracting. Drug testing laboratories shall not subcontract and shall perform all work with their own personnel and equipment unless otherwise authorized by the agency. The laboratory must be capable of performing testing for the five classes of drugs (marijuana, cocaine, opiates, phencyclidine, and amphetamines) using the initial immunoassay and confirmatory GC/MS methods specified in these Guidelines.

(k) Laboratory Facilities.

(1) Laboratory facilities shall comply with applicable provisions of any State licensure requirements.

(2) Laboratories certified in accordance with Subpart C of these Guidelines shall have the capability, at the same laboratory premises, of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

(1) Inspections. The Secretary, any Federal agency utilizing the laboratory, or any organization performing laboratory certification on behalf of the Secretary may

reserve the right to inspect the laboratory at any time. Agency contracts with laboratories for drug testing, as well as contracts for collection site services, shall permit the agency to conduct unannounced inspections. In addition, prior to the award of a contract the agency may carry out preaward inspections and evaluation of the procedural aspects of the laboratory's drug testing operation.

(m) Documentation. The drug testing laboratories shall maintain and make available for at least 2 years documentation of all aspects of the testing process. This 2-year period may be extended upon written notification by HHS or by any Federal agency for which laboratory services are being provided. The required documentation shall include personnel files on all individuals authorized to have access to specimens; chain of custody forms; quality assurance/quality control records; procedure manuals; all test data (including calibration curves and any calculations used in determining test results); reports; performance records on performance testing; performance on certification inspections; and hard copies of computer-generated data. The laboratory shall be required to maintain documents for any specimen under legal challenge for an indefinite period.

(n) Additional Requirements for Certified Laboratories.

(1) Procedure Manual. Each laboratory shall have a procedure manual which includes the principles of each test, preparation of reagents, standards and controls, calibration procedures, derivation of results, linearity of methods, sensitivity of the methods, cutoff values, mechanisms for reporting results, controls, criteria for unacceptable specimens and results, remedial actions to be taken when the test systems are outside of acceptable limits, reagents and expiration dates, and references. Copies of all procedures and dates on which they are in effect shall be maintained as part of the manual.

(2) Calibrators and Controls. Laboratory calibrators and controls shall be prepared using pure drug reference materials, stock standard solutions obtained from other laboratories, or standard solutions obtained from commercial manufacturers. The calibrators and controls shall be properly labeled as to content and concentration. The standards (e.g., pure reference materials, stock standard solutions, purchased standards) shall be labeled with the following dates: When received (if applicable); When prepared or opened; when placed in service; and expiration date.

(3) Instruments and Equipment.

(i) Volumetric pipettes and measuring devices shall be certified for accuracy or be checked by gravimetric, colorimetric, or other verification procedure. Automatic pipettes and dilutors shall be checked for accuracy and reproducibility before being placed in service and checked periodically thereafter.

(ii) There shall be written procedures for instrument set-up and normal operation, a schedule for checking critical operating characteristics for all instruments, tolerance limits for acceptable function checks, and instructions for major troubleshooting and repair. Records shall be available on preventive maintenance.

(4) Remedial Actions. There shall be written procedures for the actions to be taken when systems are out of acceptable limits or errors are detected. There shall be documentation that these procedures are followed and that all necessary corrective actions are taken. There shall also be in place systems to verify all stages of testing and reporting and documentation that these procedures are followed.

(5) Personnel Available to Testify at Proceedings. A laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against a Federal employee when that proceeding is based on positive urinalysis results reported by the laboratory.

(6) Restrictions. The laboratory shall not enter into any relationship with an agency's MRO that may be construed as a potential conflict of interest or derive any financial benefit by having an agency use a specific MRO.

Section 2.5 Quality Assurance and Quality Control

(a) General. Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, certification of calibrators and controls, and validation of analytical procedures. Quality assurance procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the testing process.

(b) Laboratory Quality Control Requirements for Initial Tests. Each analytical run of specimens to be screened shall include:

(1) Sample(s) certified to contain no drug (i.e., negative urine samples);

(2) Positive control(s) fortified with drug or metabolite;

(3) At least one positive control with the drug or metabolite at or near the threshold (cutoff); (4) A sufficient number of calibrators to ensure and document the linearity of the assay method over time in the concentration area of the cutoff. After acceptable values are obtained for the known calibrators, those values will be used to calculate sample data;

(5) A minimum of 10 percent of the total specimens and quality control samples in each analytical run shall be quality control samples; and

(6) One percent of each run, with a minimum of at least one sample, shall be the laboratory's blind quality control samples to appear as normal samples to the laboratory

analysts. Implementation of procedures to ensure that carryover does not contaminate the testing of an donor's specimen shall be documented.

(c) Laboratory Quality Control Requirements for Confirmation Tests. Each analytical run of specimens to be confirmed shall include:

(1) Sample(s) certified to contain no drug (i.e., negative urine samples);

(2) Positive calibrator(s) and control(s) fortified with drug or metabolite; and

(3) At least one positive control with the drug or metabolite at or near the threshold (cutoff). The linearity and precision of the method shall be periodically documented. Implementation of procedures to ensure that carryover does not contaminate the testing of a donor's specimen shall also be documented.

(d) Agency Blind Sample Program.

(1) Agencies shall only purchase blind quality control materials that:

(a) have been certified by immunoassay and GC/MS and

(b) have stability data which verifies those materials' performance over time.

(2) During the initial 90-day period of any new drug testing program, each agency shall submit blind performance test samples to each laboratory it contracts with in the amount of at least 20 percent of the total number of specimens submitted (up to a maximum of 200 blind samples) and thereafter a minimum of 3 percent blind samples (up to a maximum of 100 blind samples) submitted per quarter.

(3) Approximately 80 percent of the blind quality control samples shall be negative (i.e., certified to contain no drug) and the remaining samples shall be positive for one or more drugs per sample in a distribution such that all the drugs to be tested are included in approximately equal frequencies of challenge. The positive samples shall be spiked only with those drugs for which the agency is testing.

(4) The agency shall investigate any unsatisfactory blind performance test sample results and submit its findings to the Secretary. The Secretary shall continue the investigation to ensure that the laboratory has corrected the cause of the unsatisfactory performance test result. A report of the Secretary's *29924 investigative findings and the corrective action taken by the laboratory shall be sent to the agency contracting officer. The Secretary shall ensure notification of the finding to all other Federal agencies for which the laboratory is engaged in urine drug testing and coordinate any necessary action.

(5) Should a false positive error occur on a blind performance test sample and the error is determined to be an administrative error (clerical, sample mixup, etc.), the Secretary shall require the laboratory to take corrective action to minimize the occurrence of the particular error in the future; and, if there is reason to believe the error

could have been systematic, the Secretary may also require review and reanalysis of previously run specimens.

(6) Should a false positive error occur on a blind performance test sample and the error is determined to be a technical or methodological error, the laboratory shall submit all quality control data from the batch of specimens which included the false positive specimen. In addition, the laboratory shall retest all specimens analyzed positive for that drug or metabolite from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the Responsible Person. The Secretary may require an on-site review of the laboratory which may be conducted unannounced during any hours of operation of the laboratory. The Secretary has the option of revoking (section 3.13) or suspending (section 3.14) the laboratory's certification or recommending that no further action be taken if the case is one of less serious error in which corrective action has already been taken, thus reasonably assuring that the error will not occur again.

Section 2.6 Reporting and Review of Results

(a) Medical Review Officer Shall Review Results. An essential part of the drug testing program is the final review of results. A positive test result does not automatically identify an employee/applicant as an illegal drug user. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the MRO prior to the transmission of results to agency administrative officials.

(b) Medical Review Officer--Qualifications and Responsibilities. The MRO shall be a licensed physician with knowledge of substance abuse disorders. The MRO may be an employee of the agency or a contractor for the agency; however, the MRO shall not be an employee or agent of or have any financial interest in the laboratory for which the MRO is reviewing drug testing results. Additionally, the MRO shall not derive any financial benefit by having an agency use a specific drug testing laboratory or have any agreement with the laboratory that may be construed as a potential conflict of interest. The role of the MRO is to review and interpret positive test results obtained through the agency's testing program. In carrying out this responsibility, the MRO shall examine alternate medical explanations for any positive test result. This action could include conducting a medical interview with the donor, review of the donor's medical history, or review of any other relevant biomedical factors. The MRO shall review all medical records made available by the donor when a confirmed positive test could have resulted from legally prescribed medication. The MRO shall not, however,

consider the results of urine specimens that are not obtained or processed in accordance with these Guidelines.

(c) Positive Test Result. Prior to making a final decision to verify a positive test result, the MRO shall give the donor an opportunity to discuss the test result with him or her. Following verification of a positive test result, the MRO shall report the result to the agency's official designated to receive results.

(d) Verification for Opiates; Review for Prescription Medication. Before the MRO verifies a confirmed positive result for opiates, he or she shall determine that there is clinical evidence--in addition to the urine test--of illegal use of any opium, opiate, or opium derivative (e.g., morphine/codeine) listed in Schedule I or II of the Controlled Substances Act. This requirement does not apply if the confirmatory procedure for opiates confirms the presence of 6- monoacetylmorphine since the presence of this metabolite is proof of heroin use.

(e) Reanalysis Authorized. Should any question arise as to the accuracy or validity of a positive test result, only the MRO is authorized to order a retest of a single specimen or the Bottle A specimen from a split specimen collection. Such retests are authorized only at laboratories certified under these Guidelines.

(f) Result Consistent With Legal Drug Use. If the MRO determines there is a legitimate medical explanation for the positive test result, he or she shall take no further action and report the test result as negative.

(g) Result Scientifically Insufficient. Additionally, the MRO, based on review of inspection reports, quality control data, and other pertinent results, may determine that the result is scientifically insufficient for further action and declare the test specimen negative. In this situation the MRO may request a retest of the original specimen before making this decision. (The MRO may request that the retest be performed by the same laboratory or, as provided in section 2.6(e), that an aliquot of the original specimen be sent for a retest to an alternate laboratory which is certified in accordance with these Guidelines.) The laboratory shall assist in this review process as requested by the MRO by making available the individual responsible for day-to-day management of the urine drug testing laboratory or other employee who is a forensic toxicologist or who has equivalent forensic experience in urine drug testing, to provide specific consultation as required by the agency. The MRO shall report to the Secretary all negative findings based on scientific insufficiency but shall not include any personal identifying information in such reports.

(h) Reporting Final Results. The MRO shall report the final results of the drug tests in writing and in a manner designed to ensure confidentiality of the information.

Section 2.7 Protection of Employee Records

Consistent with 5 U.S.C. 522a(m) and 48 CFR 24.101-24.104, all laboratory contracts shall require that the contractor comply with the Privacy Act, 5 U.S.C. 522a. In addition, laboratory contracts shall require compliance with patient access and confidentiality provisions of section 503 of Public Law 100-71. The agency shall establish a Privacy Act System of Records or modify an existing system, or use any applicable Government-wide system of records to cover both the agency's and the laboratory's records of employee urinalysis results. The contract and the Privacy Act System of Records shall specifically require that employee records be maintained and used with the highest regard for employee privacy.

Section 2.8 Individual Access to Test and Laboratory Certification Results

In accordance with section 503 of Public Law 100-71, any Federal employee who is the subject of a drug test shall, upon written request, have access to any records relating to his or her drug test and any records relating to the results of any relevant certification, review, or revocation of certification proceedings.

Subpart C--Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies

Section 3.1 Introduction

Urine drug testing is a critical component of efforts to combat drug abuse in our society. Many laboratories are familiar with good laboratory practices but may be unfamiliar with the special procedures required when drug test results are used in the employment context. Accordingly, the following are minimum standards to certify laboratories engaged in urine drug testing for Federal agencies. Certification, even at the highest level, does not guarantee accuracy of each result reported by a laboratory conducting urine drug testing for Federal agencies. Therefore, results from laboratories certified under these Guidelines must be interpreted with a complete understanding of the total collection, analysis, and reporting process before a final conclusion is made.

Section 3.2 Goals and Objectives of Certification

(a) Uses of Urine Drug Testing. Urine drug testing is an important tool to identify drug users in a variety of settings. In the proper context, urine drug testing can be used to deter drug abuse in general. To be a useful tool, the testing procedure must be capable of detecting drugs or their metabolites at concentrations indicated in sections 2.4(e) and 2.4(f).

(b) Need to Set Standards; Inspections. Reliable discrimination between the presence, or absence, of specific drugs or their metabolites is critical, not only

to achieve the goals of the testing program but to protect the rights of the Federal employees being tested. Thus, standards have been set which laboratories engaged in Federal employee urine drug testing must meet in order to achieve maximum accuracy of test results. These laboratories will be evaluated by the Secretary or the Secretary's designee as defined in section 1.2 in accordance with these Guidelines. The qualifying evaluation will involve three rounds of performance testing plus an on-site inspection. Maintenance of certification requires participation in a quarterly performance testing program plus periodic, on-site inspections. One inspection following successful completion of a performance testing regimen is required for initial certification. This must be followed by a second inspection within 3 months, after which biannual inspections will be required to maintain certification.

(c) Urine Drug Testing Applies Analytical Forensic Toxicology. The possible impact of a positive test result on an individual's livelihood or rights, together with the possibility of a legal challenge of the result, sets this type of test apart from most clinical laboratory testing. In fact, urine drug testing should be considered a special application of analytical forensic toxicology. That is, in addition to the application of appropriate analytical methodology, the specimen must be treated as evidence, and all aspects of the testing procedure must be documented and available for possible court testimony. Laboratories engaged in urine drug testing for Federal agencies will require the services and advice of a qualified forensic toxicologist, or individual with equivalent qualifications (both training and experience) to address the specific needs of the Federal drug testing program, including the demands of chain of custody of specimens, security, proper documentation of all records, storage of positive specimens for later or independent testing, presentation of evidence in court, and expert witness testimony.

Section 3.3 General Certification Requirements

A laboratory must meet all the pertinent provisions of these Guidelines in order to qualify for and maintain certification under these standards.

Section 3.4 Capability to Test for Five Classes of Drugs

To be certified, a laboratory must be capable of testing for at least the following five classes of drugs: marijuana, cocaine, opiates, amphetamines, and phencyclidine using the initial immunoassay and quantitative confirmatory GC/MS methods specified in these Guidelines. The certification program will be limited to the five classes of drugs (sections 2.1(a) (1) and (2)) and the methods (sections 2.4 (e) and (f)) specified in these Guidelines. The laboratory will be surveyed and performance tested only for these methods and drugs.

Certification of a laboratory indicates that any test result reported by the laboratory for the Federal Government meets the standards in these Guidelines for the five classes of drugs using the methods specified. Certified laboratories must clearly inform all unregulated, private clients when their specimens are being tested using procedures that are different from those for which the laboratory is certified (i.e., testing specimens not under the Guidelines).

Section 3.5 Initial and Confirmatory Capability at Same Site

Certified laboratories shall have the capability, at the same laboratory site, of performing both initial immunoassays and confirmatory GC/MS tests (sections 2.4 (e) and (f)) for marijuana, cocaine, opiates, amphetamines, and phencyclidine and for any other drug or metabolite for which agency drug testing is authorized (sections 2.1(a) (1) and (2)). All positive initial test results shall be confirmed prior to reporting them.

Section 3.6 Personnel

Laboratory personnel shall meet the requirements specified in section 2.3 of these Guidelines. These Guidelines establish the exclusive standards for qualifying or certifying those laboratory personnel involved in urinalysis testing whose functions are prescribed by these Guidelines. A certification of a laboratory under these Guidelines shall be a determination that these qualification requirements have been met.

Section 3.7 Quality Assurance and Quality Control

Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process, including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, and validation of analytical procedures. Quality control procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs as specified in section 2.5 of these Guidelines.

Section 3.8 Security and Chain of Custody

Laboratories shall meet the security and chain of custody requirements provided in section 2.4(a).

Section 3.9 One-Year Storage for Confirmed Positives

All confirmed positive specimens shall be retained in accordance with the provisions of section 2.4(h) of these Guidelines.

Section 3.10 Documentation

The laboratory shall maintain and make available for at least 2 years documentation in accordance with the specifications in section 2.4(m).

Section 3.11 Reports

The laboratory shall report test results in accordance with the specifications in section 2.4(g).

Section 3.12 Certification

(a) General. The Secretary may certify any laboratory that meets the standards in these Guidelines to conduct urine drug testing. In addition, the Secretary may consider to be certified any laboratory that is certified by an HHS-recognized certification program in accordance with these Guidelines.

(b) Criteria. In determining whether to certify a laboratory or to accept the certification of an HHS-recognized certification program in accordance with these Guidelines, the Secretary shall consider the following criteria:

- (1) The adequacy of the laboratory facilities;
- (2) The expertise and experience of the laboratory personnel;
- (3) The excellence of the laboratory's quality assurance/ quality control program;
- (4) The performance of the laboratory on any performance tests;
- (5) The laboratory's compliance with standards as reflected in any laboratory inspections; and
- (6) Any other factors affecting the reliability and accuracy of drug tests and reporting done by the laboratory.

(c) Corrective Action by Certified Laboratories. A laboratory must meet all the pertinent provisions of these Guidelines in order to qualify for and maintain certification. The Secretary has broad discretion to take appropriate action to ensure the full reliability and accuracy of drug testing and reporting, to resolve problems related to drug testing, and to enforce all standards set forth in these Guidelines. The Secretary shall have the authority to issue directives to any laboratory suspending the use of certain analytical procedures when necessary to protect the integrity of the testing process; ordering any laboratory to undertake corrective actions to respond to material deficiencies identified by an inspection or through proficiency testing; ordering any laboratory to send aliquots of urine specimens to another laboratory for retesting when necessary to ensure the accuracy of testing under these Guidelines; ordering the review of results for specimens tested under the Guidelines for private sector clients to the extent necessary to ensure the full reliability of drug testing for Federal agencies; and ordering any other action necessary to address deficiencies in drug testing, analysis, specimen collection, chain of custody, reporting of results, or any other aspect of the certification program.

Section 3.13 Revocation

(a) General. The Secretary shall revoke certification of any laboratory certified under these provisions or accept revocation by an HHS-recognized certification program in accordance with these Guidelines if the Secretary determines that revocation is necessary to ensure the full reliability and accuracy of drug tests and the accurate reporting of test results.

(b) Factors to Consider. The Secretary shall consider the following factors in determining whether revocation is necessary:

(1) Unsatisfactory performance in analyzing and reporting the results of drug tests; for example, a false positive error in reporting the results of an employee's drug test;

(2) Unsatisfactory participation in performance evaluations or laboratory inspections;

(3) A material violation of a certification standard or a contract term or other condition imposed on the laboratory by a Federal agency using the laboratory's services;

(4) Conviction for any criminal offense committed as an incident to operation of the laboratory; or

(5) Any other cause which materially affects the ability of the laboratory to ensure the full reliability and accuracy of drug tests and the accurate reporting of results.

(c) Period and Terms. The period and terms of revocation shall be determined by the Secretary and shall depend upon the facts and circumstances of the revocation and the need to ensure accurate and reliable drug testing of Federal employees.

Section 3.14 Suspension

(a) Criteria. Whenever the Secretary has reason to believe that revocation may be required and that immediate action is necessary in order to protect the interests of the United States and its employees, the Secretary may immediately suspend a laboratory's certification to conduct urine drug testing for Federal agencies. The Secretary may also accept suspension of certification by an HHS-recognized certification program in accordance with these Guidelines.

(b) Period and Terms. The period and terms of suspension shall be determined by the Secretary and shall depend upon the facts and circumstances of the suspension and the need to ensure accurate and reliable drug testing of Federal employees.

Section 3.15 Notice

(a) Written Notice. When a laboratory is suspended or the Secretary seeks to revoke certification, the Secretary shall immediately serve the laboratory with written notice of the suspension or proposed revocation by facsimile mail,

personal service, or registered or certified mail, return receipt requested. This notice shall state the following:

(1) The reasons for the suspension or proposed revocation;
 (2) The terms of the suspension or proposed revocation;
 and

(3) The period of suspension or proposed revocation.

(b) Opportunity for Informal Review. The written notice shall state that the laboratory will be afforded an opportunity for an informal review of the suspension or proposed revocation if it so requests in writing within 30 days of the date the laboratory received the notice, or if expedited review is requested, within 3 days of the date the laboratory received the notice. Subpart D contains detailed procedures to be followed for an informal review of the suspension or proposed revocation.

(c) Effective Date. A suspension shall be effective immediately. A proposed revocation shall be effective 30 days after written notice is given or, if review is requested, upon the reviewing official's decision to uphold the proposed revocation. If the reviewing official decides not to uphold the suspension or proposed revocation, the suspension shall terminate immediately and any proposed revocation shall not take effect.

(d) HHS- Recognized Certification Program. The Secretary's responsibility under this section may be carried out by an HHS- recognized certification program in accordance with these Guidelines.

(e) Public Notice. The Secretary will publish in the Federal Register the name, address, and telephone number of any laboratory that has its certification suspended or revoked under section 3.13 or section 3.14, respectively, and the name of any laboratory which has its suspension lifted. The Secretary shall provide to any member of the public upon request the written notice provided to a laboratory that has its certification suspended or revoked, as well as the reviewing official's written decision which upholds or denies the suspension or proposed revocation under the procedures of subpart D.

Section 3.16 Recertification

Following revocation, a laboratory may apply for recertification. Unless otherwise provided by the Secretary in the notice of revocation under section 3.13(a) or the reviewing official's decision under section 4.9(e) or 4.14(a), a laboratory which has had its certification revoked may apply for certification in accordance with this section. In order to be certified, the laboratory shall meet the criteria of section 3.12(b), as well as all other requirements of these Guidelines, including the successful participation in three cycles of performance testing (sections 3.17(b) and 3.19(a)) and a laboratory inspection (sections 3.2(b) and 3.20). Once certified, the laboratory must undergo a second inspection within three months, after

which biannual inspections will be required to maintain certification (section 3.2(b)), as well as participation in the quarterly performance testing program (sections 3.1(b) and 3.17(c)).

Section 3.17 Performance Testing (PT) Requirement for Certification

(a) An Initial and Continuing Requirement. The PT program is a part of the initial evaluation of a laboratory seeking certification (both PT and laboratory inspection are required) and of the continuing assessment of laboratory performance necessary to maintain this certification.

(b) Three Initial Cycles Required. Successful participation in three cycles of testing shall be required before a laboratory is eligible to be considered for certification.

(c) Four Challenges Per Year. After certification, laboratories shall be challenged with at least 10 PT samples on a quarterly cycle.

(d) Laboratory Procedures Identical for Performance Test and Routine Employee Specimens. All procedures associated with the handling and testing of the PT samples by the laboratory shall to the greatest extent possible be carried out in a manner identical to that applied to routine laboratory specimens, unless otherwise specified.

(e) Blind Performance Test. Any certified laboratory shall be subject to blind PT samples (see section 2.5(d)). Performance on blind PT samples shall be at the same level as for the open or non-blind PT samples.

(f) Reporting--Open Performance Test. The laboratory shall report results of open PT samples to the certifying organization in the same manner as specified in section 2.4(g)(2) for routine specimens.

Section 3.18 Performance Test Samples Composition

(a) Description of the Drugs. PT samples shall contain those drugs and metabolites which each certified laboratory must be prepared to assay in concentration ranges that allow detection of the analytes by commonly used immunoassay screening techniques. These levels are generally in the range of concentrations which might be expected in the urine of recent drug users. For some drug analytes, the sample composition will consist of the parent drug as well as major metabolites. In some cases, more than one drug class may be included in one sample, but generally no more than two drugs will be present in any one sample in order to imitate the type of specimen which a laboratory normally encounters. For any particular PT cycle, the actual composition of kits going to different laboratories will vary but, within any annual period, all laboratories participating will have analyzed the same total set of samples.

(b) Concentrations. PT samples (as differentiated from blind quality control samples) shall be spiked with the drug classes and their metabolites that are required for certification (marijuana, cocaine, opiates, amphetamines, and phencyclidine) with concentration levels set by, but not limited to, one of the following schema:

(1) At least 20 percent above the cutoff limit for either the initial assay or the confirmatory test, depending on which is to be evaluated;

(2) below the cutoff limit as retest samples (for GC/MS quantitation); and,

(3) below the cutoff limit for special purposes. Some PT samples may be identified for GC/MS assay only (retest samples). Blanks shall contain less than 2 ng/mL of any of the target drugs. These concentration and drug types may be changed periodically in response to factors such as changes in detection technology and patterns of drug use. Finally, PT samples may be constituted with interfering substances.

Section 3.19 Evaluation of Performance Testing

(a) Initial Certification.

(1) An applicant laboratory shall not report any false positive result during PT for initial certification. Any false positive will automatically disqualify a laboratory from further consideration.

(2) An applicant laboratory shall maintain an overall grade level of 90 percent for the three cycles of PT required for initial certification, i.e., it must correctly identify and confirm 90 percent of the total drug challenges. Any laboratory which achieves a score on any one cycle of the initial certification such that it can no longer achieve a total grade of 90 percent over the three consecutive PT cycles will be immediately disqualified from further consideration.

(3) An applicant laboratory shall obtain quantitative values for at least 80 percent of the total drug challenges which are 1B20 percent or 1B2 standard deviations (whichever range is larger) of the calculated reference group mean. Failure to achieve 80 percent will result in disqualification.

(4) An applicant laboratory shall not obtain any quantitative values that differ by more than 50 percent from the calculated reference group mean. Any quantitative values that differ by more than 50 percent will result in disqualification.

(5) For any individual drug, an applicant laboratory shall successfully detect and quantitate in accordance with paragraphs (a)(2), (a)(3), and (a)(4) of this section at least 50 percent of the total drug challenges. Failure to successfully quantitate at least 50 percent of the challenges for any individual drug will result in disqualification.

(b) Ongoing Testing of Certified Laboratories.

(1) False Positives and Procedures for Dealing with Them. No false drug identifications are acceptable for any drugs for which a laboratory offers service. Under some circumstances a false positive test may result in suspension or revocation of certification. The most serious false positives are by drug class, such as reporting THC in a blank specimen or reporting cocaine in a specimen known to contain only opiates. Misidentifications within a class (e.g., codeine for morphine) are also false positives which are unacceptable in an appropriately controlled laboratory, but they are clearly less serious errors than misidentification of a class. The following procedures shall be followed when dealing with a false positive: (i) The agency detecting a false positive error shall immediately notify the laboratory and the Secretary of any such error. (ii) The laboratory shall provide the Secretary with a written explanation of the reasons for the error within 5 working days. If required by paragraph (b)(1)(v) below, this explanation shall include the submission of all quality control data from the batch of specimens that included the false positive specimen. (iii) The Secretary shall review the laboratory's explanation within 5 working days and decide what further action, if any, to take. (iv) If the error is determined to be an administrative error (clerical, sample mixup, etc.), the Secretary may direct the laboratory to take corrective action to minimize the occurrence of the particular error in the future and, if *29928 there is reason to believe the error could have been systematic, may require the laboratory to review and reanalyze previously run specimens. (v) If the error is determined to be a technical or methodological error, the laboratory shall submit to the Secretary all quality control data from the batch of specimens which included the false positive specimen. In addition, the laboratory shall retest all specimens analyzed positive by the laboratory from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the laboratory's responsible person. Depending on the type of error which caused the false positive, this retesting may be limited to one analyte or may include any drugs a laboratory certified under these Guidelines must be prepared to assay. The laboratory shall immediately notify the agency if any result on a specimen that has been retested must be corrected because the criteria for a positive are not satisfied. The Secretary may suspend or revoke the laboratory's certification for all drugs or for only the drug or drug class in which the error occurred. However, if the case is one of a less serious error for which effective corrections have already been made, thus reasonably assuring that the error will not occur again, the Secretary may decide to take no further action. (vi)

During the time required to resolve the error, the laboratory shall remain certified but shall have a designation indicating that a false positive result is pending resolution. If the Secretary determines that the laboratory's certification must be suspended or revoked, the laboratory's official status will become "Suspended" or "Revoked" until the suspension or revocation is lifted or any recertification process is complete.

(2) Requirement to Identify and Confirm 90 Percent of Total Drug Challenges. In order to remain certified, laboratories must successfully complete four cycles of PT per year. Failure of a certified laboratory to maintain a grade of 90 percent over the span of two consecutive PT cycles, i.e., to identify 90 percent of the total drug challenges and to correctly confirm 90 percent of the total drug challenges, may result in suspension or revocation of certification.

(3) Requirement to Quantitate 80 Percent of Total Drug Challenges at 1B20 Percent or 1B2 Standard Deviations. Quantitative values obtained by a certified laboratory for at least 80 percent of the total drug challenges must be 1B20 percent or 1B2 standard deviations (whichever range is larger) of the appropriate reference or peer group mean as measured over two consecutive PT cycles.

(4) Requirement to Quantitate Within 50 Percent of Calculated Reference Group Mean. After achieving certification a laboratory is permitted one quantitative result differing by more than 50% from the target value within two consecutive cycles of PT. More than one error of this type within two consecutive PT cycles may result in a suspension or proposed revocation.

(5) Requirement to Successfully Detect and Quantitate 50 Percent of the Total Drug Challenges for Any Individual Drug. For any individual drug, a certified laboratory must successfully detect and quantitate in accordance with paragraphs (b)(2), (b)(3), and (b)(4) of this section at least 50 percent of the total drug challenges.

(6) Procedures When Requirements in Paragraphs (b)(2)--(b)(5) of this Section Are Not Met. If a certified laboratory fails to maintain a grade of 90 percent over the span of two consecutive PT cycles after initial certification as required by paragraph (b)(2) of this section or if it fails to successfully quantitate results as required by paragraphs (b)(3), (b)(4), or (b)(5) of this section, the laboratory shall be immediately informed that its performance fell under the 90 percent level or that it failed to quantitate test results successfully and how it failed to quantitate successfully. The laboratory shall be allowed 5 working days in which to provide any explanation for its unsuccessful performance, including administrative error or methodological error, and evidence that the source of the poor performance has been corrected. The Secretary may revoke or suspend the laboratory's certification or take no further action, depending on the seriousness of the

errors and whether there is evidence that the source of the poor performance has been corrected and that current performance meets the requirements for a certified laboratory under these Guidelines. The Secretary may require that additional performance tests be carried out to determine whether the source of the poor performance has been removed. If the Secretary determines to suspend or revoke the laboratory's certification, the laboratory's official status will become "Suspended" or "Revoked" until the suspension or revocation is lifted or until any recertification process is complete.

(c) 80 Percent of Participating Laboratories Must Detect Drug. A laboratory's performance shall be evaluated for all samples for which drugs were spiked at concentrations above the specified performance test level unless the overall response from participating laboratories indicates that less than 80 percent of them were able to detect a drug.

(d) Participation Required. Failure to participate in a PT cycle or to participate satisfactorily may result in suspension or revocation of certification.

Section 3.20 Inspections

(a) Frequency. Prior to laboratory certification under these Guidelines and at least twice a year after certification, a team of three qualified inspectors, at least two of whom have been trained as laboratory inspectors, shall conduct an on-site inspection of laboratory premises. Inspections shall document the overall quality of the laboratory setting for the purposes of certification to conduct urine drug testing. Inspection reports may also contain recommendations to the laboratory to correct deficiencies noted during the inspection.

(b) Inspectors. The Secretary shall establish criteria for the selection of inspectors to ensure high quality, unbiased, and thorough inspections. The inspectors shall perform inspections consistent with the guidance provided by the Secretary. Inspectors shall document the overall quality of the laboratory's drug testing operation.

(c) Inspection Performance. The laboratory's operation shall be consistent with good forensic laboratory practice and shall be in compliance with these Guidelines. It is the laboratory's responsibility to correct deficiencies identified during the inspection and to have the knowledge, skill, and expertise to correct deficiencies consistent with good forensic laboratory practice. Consistent with sections 3.13 and 3.14, deficiencies identified at inspections may be the basis for suspending or revoking a laboratory's certification.

Section 3.21 Results of Inadequate Performance

Failure of a laboratory to comply with any aspect of these Guidelines may lead to revocation or suspension of

certification as provided in sections 3.13 and 3.14 of these Guidelines.

Section 3.22 Listing of Certified Laboratories

A Federal Register listing of laboratories certified by HHS will be updated and published periodically. Laboratories which are in the applicant stage of HHS certification are not to be considered as meeting the minimum requirements in these Guidelines. A laboratory is not certified until HHS has sent the laboratory an HHS letter of certification.

Subpart D--Procedures for Review of Suspension or Proposed Revocation of a Certified Laboratory

Section 4.1 Applicability

These procedures apply when:

(a) The Secretary has notified a laboratory in writing that its certification to perform urine drug testing under these Mandatory Guidelines for Federal Workplace Drug Testing Programs has been suspended or that the Secretary proposes to revoke such certification.

(b) The laboratory has, within 30 days of the date of such notification or within 3 days of the date of such notification when seeking an expedited review of a suspension, requested in writing an opportunity for an informal review of the suspension or proposed revocation.

Section 4.2 Definitions

Appellant: Means the laboratory which has been notified of its suspension or proposed revocation of its certification to perform urine drug testing and has requested an informal review thereof.

Respondent: Means the person or persons designated by the Secretary in implementing these Guidelines (currently the National Laboratory Certification Program is located in the Division of Workplace Programs, Substance Abuse and Mental Health Services Administration).

Reviewing Official: Means the person or persons designated by the Secretary who will review the suspension or proposed revocation. The reviewing official may be assisted by one or more of his or her employees or consultants in assessing and weighing the scientific and technical evidence and other information submitted by the appellant and respondent on the reasons for the suspension and proposed revocation.

Section 4.3 Limitation on Issues Subject to Review

The scope of review shall be limited to the facts relevant to any suspension or proposed revocation, the necessary interpretations of those facts, the Mandatory Guidelines for Federal Workplace Drug Testing Programs, and other relevant law. The legal validity of the Mandatory

Guidelines shall not be subject to review under these procedures.

Section 4.4 Specifying Who Represents the Parties

The appellant's request for review shall specify the name, address, and phone number of the appellant's representative. In its first written submission to the reviewing official, the respondent shall specify the name, address, and phone number of the respondent's representative.

Section 4.5 The Request for Informal Review and the Reviewing Official's Response

(a) Within 30 days of the date of the notice of the suspension or proposed revocation, the appellant must submit a written request to the reviewing official seeking review, unless some other time period is agreed to by the parties. A copy must also be sent to the respondent. The request for review must include a copy of the notice of suspension or proposed revocation, a brief statement of why the decision to suspend or propose revocation is wrong, and the appellant's request for an oral presentation, if desired.

(b) Within 5 days after receiving the request for review, the reviewing official will send an acknowledgment and advise the appellant of the next steps. The reviewing official will also send a copy of the acknowledgment to the respondent.

Section 4.6 Abeyance Agreement

Upon mutual agreement of the parties to hold these procedures in abeyance, the reviewing official will stay these procedures for a reasonable time while the laboratory attempts to regain compliance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs or the parties otherwise attempt to settle the dispute. As part of an abeyance agreement, the parties can agree to extend the time period for requesting review of the suspension or proposed revocation. If abeyance begins after a request for review has been filed, the appellant shall notify the reviewing official at the end of the abeyance period advising whether the dispute has been resolved. If the dispute has been resolved, the request for review will be dismissed. If the dispute has not been resolved, the review procedures will begin at the point at which they were interrupted by the abeyance agreement with such modifications to the procedures as the reviewing official deems appropriate.

Section 4.7 Preparation of the Review File and Written Argument

The appellant and the respondent each participate in developing the file for the reviewing official and in submitting written arguments. The procedures for development of the review file and submission of written argument are:

(a) Appellant's Documents and Brief. Within 15 days after receiving the acknowledgment of the request for review, the appellant shall submit to the reviewing official the following (with a copy to the respondent):

(1) A review file containing the documents supporting appellant's argument, tabbed and organized chronologically, and accompanied by an index identifying each document. Only essential documents should be submitted to the reviewing official.

(2) A written statement, not to exceed 20 double-spaced pages, explaining why respondent's decision to suspend or propose revocation of appellant's certification is wrong (appellant's brief).

(b) Respondent's Documents and Brief. Within 15 days after receiving a copy of the acknowledgment of the request for review, the respondent shall submit to the reviewing official the following (with a copy to the appellant):

(1) A review file containing documents supporting respondent's decision to suspend or revoke appellant's certification to perform urine drug testing, tabbed and organized chronologically, and accompanied by an index identifying each document. Only essential documents should be submitted to the reviewing official.

(2) A written statement, not exceeding 20 double-spaced pages in length, explaining the basis for suspension or proposed revocation (respondent's brief).

(c) Reply Briefs. Within 5 days after receiving the opposing party's submission, or 20 days after receiving acknowledgment of the request for review, whichever is later, each party may submit a short reply not to exceed 10 double-spaced pages.

(d) Cooperative Efforts. Whenever feasible, the parties should attempt to develop a joint review file.

(e) Excessive Documentation. The reviewing official may take any appropriate step to reduce excessive documentation, including the return of or refusal to consider documentation found to be irrelevant, redundant, or unnecessary.

Section 4.8 Opportunity for Oral Presentation

(a) Electing Oral Presentation. If an opportunity for an oral presentation is desired, the appellant shall request it at the time it submits its written request for review to the reviewing official. The reviewing official will grant the request if the official determines that the decision-making process will be substantially aided by oral presentations and arguments. The reviewing official may also provide for an oral presentation at the official's own initiative or at the request of the respondent.

(b) Presiding Official. The reviewing official or designee will be the presiding official responsible for conducting the oral presentation.

(c) Preliminary Conference. The presiding official may hold a prehearing conference (usually a telephone conference call) to consider any of the following: simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; time allotted for each witness and the hearing altogether; scheduling the hearing; and any other matter that will assist in the review process. Normally, this conference will be conducted informally and off the record; however, the presiding official may, at his or her discretion, produce a written document summarizing the conference or transcribe the conference, either of which will be made a part of the record.

(d) Time and Place of Oral Presentation. The presiding official will attempt to schedule the oral presentation within 30 days of the date appellant's request for review is received or within 10 days of submission of the last reply brief, whichever is later. The oral presentation will be held at a time and place determined by the presiding official following consultation with the parties.

(e) Conduct of the Oral Presentation.

(1) General. The presiding official is responsible for conducting the oral presentation. The presiding official may be assisted by one or more of his or her employees or consultants in conducting the oral presentation and reviewing the evidence. While the oral presentation will be kept as informal as possible, the presiding official may take all necessary steps to ensure an orderly proceeding.

(2) Burden of Proof/Standard of Proof. In all cases, the respondent bears the burden of proving by a preponderance of the evidence that its decision to suspend or propose revocation is appropriate. The appellant, however, has a responsibility to respond to the respondent's allegations with evidence and argument to show that the respondent is wrong.

(3) Admission of Evidence. The rules of evidence do not apply and the presiding official will generally admit all testimonial evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. Each party may make an opening and closing statement, may present witnesses as agreed upon in the prehearing conference or otherwise, and may question the opposing party's witnesses. Since the parties have ample opportunity to prepare the review file, a party may introduce additional documentation during the oral presentation only with the permission of the presiding official. The presiding official may question witnesses directly and take such other steps necessary to ensure an effective and efficient consideration of the evidence, including setting time limitations on direct and cross-examinations.

(4) Motions. The presiding official may rule on motions including, for example, motions to exclude or strike redundant or immaterial evidence, motions to dismiss the case for insufficient evidence, or motions for summary judgment. Except for those made during the hearing, all motions and opposition to motions, including argument, must be in writing and be no more than 10 double-spaced pages in length. The presiding official will set a reasonable time for the party opposing the motion to reply.

(5) Transcripts. The presiding official shall have the oral presentation transcribed and the transcript shall be made a part of the record. Either party may request a copy of the transcript and the requesting party shall be responsible for paying for its copy of the transcript.

(f) Obstruction of Justice or Making of False Statements. Obstruction of justice or the making of false statements by a witness or any other person may be the basis for a criminal prosecution under 18 U.S.C. 1505 or 1001.

(g) Post-hearing Procedures. At his or her discretion, the presiding official may require or permit the parties to submit post-hearing briefs or proposed findings and conclusions. Each party may submit comments on any major prejudicial errors in the transcript.

Section 4.9 Expedited Procedures for Review of Immediate Suspension

(a) Applicability. When the Secretary notifies a laboratory in writing that its certification to perform urine drug testing has been immediately suspended, the appellant may request an expedited review of the suspension and any proposed revocation. The appellant must submit this request in writing to the reviewing official within 3 days of the date the laboratory received notice of the suspension. The request for review must include a copy of the suspension and any proposed revocation, a brief statement of why the decision to suspend and propose revocation is wrong, and the appellant's request for an oral presentation, if desired. A copy of the request for review must also be sent to the respondent.

(b) Reviewing Official's Response. As soon as practicable after the request for review is received, the reviewing official will send an acknowledgment with a copy to the respondent.

(c) Review File and Briefs. Within 7 days of the date the request for review is received, but no later than 2 days before an oral presentation, each party shall submit to the reviewing official the following: (1) a review file containing essential documents relevant to the review, tabbed, indexed, and organized chronologically, and (2) a written statement, not to exceed 20 double-spaced pages, explaining the party's position concerning the suspension and any proposed revocation. No reply brief is permitted.

(d) Oral Presentation. If an oral presentation is requested by the appellant or otherwise granted by the reviewing official, the presiding official will attempt to schedule the oral presentation within 7-10 days of the date of appellant's request for review at a time and place determined by the presiding official following consultation with the parties. The presiding official may hold a pre-hearing conference in accordance with section 4.8(c) and will conduct the oral presentation in accordance with the procedures of sections 4.8 (e), (f), and (g).

(e) Written Decision. The reviewing official shall issue a written decision upholding or denying the suspension or proposed revocation and will attempt to issue the decision within 7-10 days of the date of the oral presentation or within 3 days of the date on which the transcript is received or the date of the last submission by either party, whichever is later. All other provisions set forth in section 4.14 will apply.

(f) Transmission of Written Communications. Because of the importance of timeliness for these expedited procedures, all written communications between the parties and between either party and the reviewing official shall be by facsimile or overnight mail. Except for routine administrative and procedural matters, a party shall not communicate with the reviewing or presiding official without notice to the other party.

Section 4.11 Transmission of Written Communications by Reviewing Official and Calculation of Deadlines

(a) Because of the importance of a timely review, the reviewing official should normally transmit written *29931 communications to either party by facsimile or overnight mail in which case the date of transmission or day following mailing will be considered the date of receipt. In the case of communications sent by regular mail, the date of receipt will be considered 3 days after the date of mailing.

(b) In counting days, include Saturdays, Sundays, and holidays. However, if a due date falls on a Saturday, Sunday, or Federal holiday, then the due date is the next Federal working day.

Section 4.12 Authority and Responsibilities of Reviewing Official

In addition to any other authority specified in these procedures, the reviewing official and the presiding official, with respect to those authorities involving the oral presentation, shall have the authority to issue orders; examine witnesses; take all steps necessary for the conduct of an orderly hearing; rule on requests and motions; grant extensions of time for good reasons; dismiss for failure to meet deadlines or other requirements; order the parties to submit relevant information or witnesses; remand a case for further action by the respondent; waive

or modify these procedures in a specific case, usually with notice to the parties; reconsider a decision of the reviewing official where a party promptly alleges a clear error of fact or law; and to take any other action necessary to resolve disputes in accordance with the objectives of these procedures.

Section 4.13 Administrative Record

The administrative record of review consists of the review file; other submissions by the parties; transcripts or other records of any meetings, conference calls, or oral presentation; evidence submitted at the oral presentation; and orders and other documents issued by the reviewing and presiding officials.

Section 4.14 Written Decision

(a) Issuance of Decision. The reviewing official shall issue a written decision upholding or denying the suspension or proposed revocation. The decision will set forth the reasons for the decision and describe the basis therefor in the record. Furthermore, the reviewing official may remand the matter to the respondent for such further action as the reviewing official deems appropriate.

(b) Date of Decision. The reviewing official will attempt to issue his or her decision within 15 days of the date of the oral presentation, the date on which the transcript is received, or the date of the last submission by either party, whichever is later. If there is no oral presentation, the decision will normally be issued within 15 days of the date of receipt of the last reply brief. Once issued, the reviewing official will immediately communicate the decision to each party.

(c) Public Notice. If the suspension and proposed revocation are upheld, the revocation will become effective immediately and the public will be notified by publication of a notice in the Federal Register. If the suspension and proposed revocation are denied, the revocation will not take effect and the suspension will be lifted immediately. Public notice will be given by publication in the Federal Register.

Section 4.15 Court Review of Final Administrative Action; Exhaustion of Administrative Remedies

Before any legal action is filed in court challenging the suspension or proposed revocation, respondent shall exhaust administrative remedies provided under this subpart, unless otherwise provided by Federal Law. The reviewing official's decision, under section 4.9(e) or 4.14(a), constitutes final agency action and is ripe for judicial review as of the date of the decision.

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BIOGRAPHICAL SKETCH

Scott D. Elliott was born in Grand Rapids, Michigan, in 1953. He attended Hixson High School in Chattanooga, Tennessee, and was graduated in 1971. He studied mass communications at Middle Tennessee State University in Murfreesboro, Tennessee, for three years before embarking on a career in print and broadcast journalism. After rising to the rank of executive editor of a Texas daily newspaper and winning some forty-five national, state, and regional awards in Associated Press writing competitions, he returned to college and earned Bachelor of Science and Master of Science degrees in journalism from the University of Texas and East Texas State University, respectively, in 1985 and 1987.

In 1984, he began teaching journalism classes and serving as director of public relations at Trinity Valley Community College in Athens, Texas. In 1987, he accepted a similar post at Central Florida Community College in Ocala, Florida, and also began working toward a Doctor of Education in the University of Florida's Educational Leadership Department. In 1989, he became provost of the Citrus County Campus of Central Florida Community College and four years later was promoted to associate vice president.

He currently resides in Crystal River, Florida, with his wife of twenty-two years, Claudia, and their children, Stacie Leigh and Scotty.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Education.



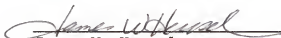
R. Craig Wood, Chair
Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Education.



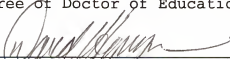
James L. Wattenbarger
Distinguished Service Professor of
Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Education.



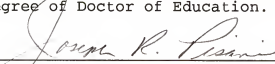
James W. Hensel
Professor of Educational Leadership

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David S. Honeyman
Associate Professor of Educational
Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Education.



Joseph R. Pisani
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This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate School and was accepted as partial fulfillment of the requirements of the degree of Doctor of Education.

December 1994



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